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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 482.

THE UNITED STATES OF AMERICA *EX REL.* MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT S. BURLESON, POSTMASTER GENERAL OF THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page.
Caption	1
Transcript from supreme court of the District of Columbia	1
Caption	1
Petition for mandamus	1
Rule to show cause	9
Marshal's return	10
Answer of defendant	10
Pleas	46
Demurrer to relator's plea	47
Demurrer submitted	47
Demurrer to pleas sustained; demurrer to answer and joinder filed	48

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 21, 1919.

Page.

Demurrer to answer overruled; rule to show cause discharged; petition dismissed and exception noted 48
Appeal noted by plaintiff 48
Memorandum: Appeal bond, $100, approved and filed 48
Assignment of errors 48
Designation of record 49
Clerk's certificate 49
Entry of submission 51
Opinion 51
Judgment 53
Order granting writ of error 54
Writ of error 54
Bond on writ of error 55
Assignment of errors 56
Citation and service 57
Clerk's certificate 58

Court of Appeals of the District of Columbia.

No. 3164.

THE UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING CO., Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States.

a Supreme Court of the District of Columbia.

At Law. No. 60784.

THE UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY, Relator (Plaintiff),

vs.

ALBERT S. BURLESON, Postmaster-General of the United States, Respondent (Defendant).

THE UNITED STATES OF AMERICA,
District of Columbia, ss:

Be It Remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

1 *Petition for Mandamus.*

Filed November 5, 1917.

In the Supreme Court of the District of Columbia.

At Law. No. 60784.

THE UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY, Relator,

vs.

ALBERT S. BURLESON, Postmaster General of the United States, Respondent.

The petition of the Milwaukee Social Democratic Publishing Company, by its President, E. H. Thomas, respectfully alleges and shows unto this Honorable Court:

That said Milwaukee Social Democratic Publishing Company is, and has been for many years last past a corporation duly organized under the laws of the State of Wisconsin, with its principal office located at Milwaukee, Wisconsin. That it has for many years last past published a daily newspaper known as the Milwaukee Leader. That the stockholders and bondholders of said corporation number Twelve thousand (12,000) more or less, consisting principally of the members of the Social Democratic party. That the directors of said corporation have duly empowered and designated E. H. Thomas to act for and in behalf of said corporation in all matters pertaining to the above entitled proceeding.

Your petitioner further says that there is invested in the securities and property of the Milwaukee Social Democratic Publishing Company about Four Hundred Thousand ($400,000) Dollars. That it has a daily circulation of Forty thousand (40,000) more or less, as appears in its sworn report to the Government, and that
2 it circulates throughout the United States. That it has complied in every respect to the laws of the Government of the United States which entitles it to the use of the post offices and post roads of the United States as second-class mail matter, and that for many years last past it was received and circulated in the mails of the United States as second-class mail matter. That the income of said paper is vitally dependent upon the privilege of using said mails, not only in the matter of income secured from subscribers to said paper, but in the income secured from advertisers, the procuring of which advertisers is dependent upon the continued right and privilege to use said mails. That the present organization and business of said newspaper is the result of years of organization and enterprise.

That on the 15th day of June, 1917, there was enacted a law of the United States commonly denominated the Espionage Law; and that on the 13th day of September, 1917, there was received through the mail from the Post Office Department of the United States a letter dated September 11th, 1917, an exact — of which is here set forth, as follows:

WASHINGTON, September 11, 1917.

141179

Publisher, "The Milwaukee Leader," Milwaukee, Wisconsin.

SIR: You are hereby notified that, in accordance with the Act of Congress approved March 3, 1901 (ch. 851, 31 Stat. L. 1907), you will be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at 2:00 P. M., on Saturday, September 22, 1917, to show cause why the authorization of admission of "The Milwaukee Leader" to the second class mail
3 matter under the Act of March 3, 1879, (ch. 180, sec. 14, 1 Supp., 246), should not be revoked, upon the following ground:

The publication is not a "newspaper or other periodical publication" within the meaning of the law governing mailable matter

of the second class, it being in conflict with the provisions of the law embodied in section 481½, Postal laws and Regulations.

Your appearance at the hearing may be in person or by representative. In any event, your answer must be in writing. It should be submitted on or before September 22, 1917, and will be given the same consideration as though you appeared in person or by representative.

Respectfully,

A. M. DOCKERY,
Third Assistant Postmaster General.

Registered 3585.

That there was contained in said same mail enclosure a printed slip, a copy of which is here set forth, as follows:

Order of the Postmaster General.

OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, June 16, 1917.

Order No. 431.

The Postal Laws and Regulations of 1913 is hereby amended by the addition of the following as section 481½.

1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this act (Act of June 15, 1917, Espionage Bill), is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: Provided, That nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself. (Act of June 15, 1917, Sec. 1, Title XII.)

2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be non-mailable. (Act of June 15, 1917, Sec. 2, Title XII.)

4 3. Paragraph 1 above relates to mail matter of any class which is in violation of any of the provisions of the Act of June 15, 1917, known as the Espionage Bill, and applied specifically to all matter which is intended to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or which is intended to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or which is intended to obstruct the recruiting or enlistment service of the United States. (Act of June 15, 1917, Sec. 3, Title I.)

4. Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title (Title XII, Act of June 15, 1917, Espionage Bill) to be non-mailable, shall be fined not more than $5,000 or imprisoned not more than five years, or both. Any person violating any provision of this title may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed. (Act of June 15, 1917, Sec. 3, Title XII.)

5. The postmaster shall not give opinions to the public, and when in doubt as to the mailability of any matter under the above statute he shall withhold the same from dispatch or delivery, as the case may be, and submit the question with samples of the matter to the Solicitor for the Post Office Department for instructions.

A. S. BURLESON,
Postmaster General.

That in response to the citation of said letter petitioner sent its editor, Victor L. Berger, to Washington. That at said time there were present the Third Assistant Postmaster General, Hon. A. M. Dockery, as your petitioner is informed, representing the Postmaster General of the United States. That at said meeting, as petitioner is informed, inquiry was made as to matters concerning the Milwaukee Leader, its ownership and the authenticity of certain articles which had appeared in said paper. That said hearing was of the most informal character, there being no sworn testimony taken, there being no pleadings or issue made, and the Postmaster
5 General of the United States not being present at any time in person. That petitioner is informed that in response to the inquiry to said Third Assistant Postmaster General as to what specific article or what specific offense was charged against said paper to constitute a violation of the Espionage Law above referred to, the reply of the representatives of the Postmaster General was in substance that "the tendency of the paper was seditious."

That shortly thereafter there was issued from the Department of the Postmaster General a letter directed to the Postmaster of the City of Milwaukee, a copy of which is here set forth, and is as follows:

Division of Classification,
Post Office Department,
Third Assistant Postmaster General.

WASHINGTON, October, 1917.
C. D. No. 141179.

Postmaster, Milwaukee, Wis.:

Upon the issuance of a citation to the publisher of "The Milwaukee Leader" to show cause on September 22, 1917, why the author-

ization for admission of that publication to the second class of mail matter should not be revoked, and after a hearing accorded the publisher on that date, the Department, upon consideration of all the facts before it, hereby determines, and you will so inform the publisher, that "The Milwaukee Leader" is not entitled to transmission in the mails at the second class rates of postage because it appears from the evidence in possession of the Department that the publication is not a "newspaper or other periodical publication" within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations.

Therefore, the authorization heretofore issued for the acceptance of "The Milwaukee Leader" for mailing at the second class rates of postage is hereby revoked, and you are requested to enter that fact upon the records of your post office.

(Signed) A. M. DOCKERY,
S. A. M.-r. w. *Third Assistant Postmaster General.*

6 That on October 3rd, 1917, there was received by the Milwaukee Leader a letter, a copy of which is here set forth, and is as follows:

OCT. 3, 1917.

The Milwaukee Leader, 6th and Chestnut Sts., Milwaukee, Wis.

GENTLEMEN: I am in receipt of a letter from the Third Assistant Postmaster General stating:

"That 'The Milwaukee Leader' is not entitled to transmission in the mails at the second class rates of postage because it appears from the evidence in possession of the Department that the publication is not a 'newspaper or other periodical publication' within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in Section 481½, Postal Laws and Regulations."

Pursuant therefore, the authorization granted you for mailing The Milwaukee Leader at the second class rates of postage is revoked.

A copy of the Department's letter is herewith enclosed.

Very respectfully,

F. B. SCHUTZ,
Postmaster.

That on said same date, October 3rd, 1917, after the receipt of said letter from said Postmaster, the following telegram was sent to the Hon. Albert S. Burleson, Postmaster General:

MILWAUKEE, Wis., Oct. 3, 1917.

Hon. Albert S. Burleson, Postmaster General, Washington, D. C.

I hereby appeal from the decision of the Third Assistant Postmaster General revoking the second class mailing privilege of the

Milwaukee Leader and request you kindly to instruct the
7 Milwaukee postmaster by wire to receive the paper until my appeal has been heard and decided upon by you. Please wire me an answer.

VICTOR BERGER,
Editor Milwaukee Leader.

Paid.

That on said same date there was received from said Postmaster General the following telegram:

WASHINGTON, D. C., Oct. 3-17.

Victor Berger, Editor Milwaukee Leader, Milwaukee, Wis.:

I have reviewed the action of the third assistant postmaster general in revoking the second class privilege of the Milwaukee Leader, and approve same. At the instance of Mr. Brisbane I reexamined carefully the record made in the case and find no reason for rescinding the action taken.

A. S. BURLESON,
Postmaster General.

That in conformance with the orders hereinbefore set forth of the Postmaster General, his assistants and subordinates, the use of the mails was forbidden to the said daily newspaper known as The Milwaukee Leader, edited and published by said Milwaukee Social Democratic Publishing Company, and that at the present time and for an indeterminate time in the future, as petitioner is informed and believes, it will be forbidden the use of and denied all second-class and other mailing privileges; and as a result of said orders of the said Postmaster General the mail circulation of the said The Milwaukee Leader has been made impossible, and that said Milwaukee Social Democratic Publishing Company has been compelled to discontinue mailing its said papers to its mail subscribers. That as a consequence of said action it has been deprived of the daily circulation of approximately Fifteen thousand (15,000) subscribers. That to be deprived of the use of said mailing privileges is destructive of the organization
of and the circulation of the said paper, and in substance and
8 effect destroys the property of the Milwaukee Social Democratic Publishing Company; and that the continued denial of the use of said mailing privileges will do irreparable damage to said paper and to said Company.

That at the hearing before the Postmaster General's Department, as hereinbefore described, its representative at said meeting denied that it had ever committed any act in violation of the Espionage Law, and that petitioner still makes and ever will make such claim; and that at no time since the enactment of the said so-called Espionage Law, or at any time prior thereto, has ever caused to be printed and set forth in the said Milwaukee Leader any article or articles which in any way or manner contain any matter advocating or urg-

ing treason, insurrection, or forcible resistance to any law of the United States.

That the said Milwaukee Leader has for many years last past been the spokesman and so-called organ of the Socialist Party of the City of Milwaukee in the State of Wisconsin, and elsewhere, and the so-called organ of a great number of labor unions and other organizations in said same territory.

That the International Socialists of the world and the Socialist Party of the United States have for many years been the advocates of international peace. That the said Milwaukee Leader has in its columns advocated this principle of peace, but has at no time published articles tending to breach any of the provisions of the said Espionage Law. That there were presented no facts to the Postmaster General's Department, nor has said Department in its possession any facts or any articles or any writings published in said Milwaukee Leader which come within the provisions of the said Espion-
9 age Law.

That the proceedings of the Postmaster General, his assistants and subordinates, and the order of said Postmaster General's Department in reference to the publication printed and issued by petitioner have destroyed the property of said Milwaukee Social Democratic Publishing Company without due process of law, as guaranteed by the Constitution of the United States.

That the provisions of said Espionage Law do not provide for any proceedings by which through due process of law there could be determined whether any of the provisions of said Espionage Law have been violated or not. That the offenses defined in said Espionage Law are each and every of them offenses, the determination of which can only be had after judicial consideration by a competent tribunal. That the provisions of said law giving and authorizing the Postmaster General, his assistants and subordinates, to determine the question of when an offense has been committed in violation of the provisions of said Act are unconstitutional and do not afford to accused a right to trial in a court of competent jurisdiction.

That the action of said Postmaster General hereinbefore referred to has deprived petitioner of the constitutional right to free speech, and has been and is destructive of the rights of a free press, thereby not only doing irreparable injury to petitioner, but to the people of the United States in general.

That the duties of the Postmaster General of the United States, as they concern the right to the use of the mails, under the circumstances in the instant case, are purely of a ministerial nature.
10 That there is reposed in him no judicial power to determine issues of facts, nor can such be found in the text or by implication in said Espionage Law. That the grounds alleged in the Espionage Law upon which a determination could be predicated by the Postmaster General to justify his action in the premises in each instance raises issues of fact, the determination of which issues of facts clearly involved acts destructive of the property of the Milwaukee Social Democratic Publishing Company and of all citizens of the United States. That the Espionage Law thereby seeks to

enact in the law authority for an executive officer of the Government to destroy valuable property rights, if he please, upon his mere whim and caprice, and seeks to clothe an executive officer of the Government with the power necessarily belonging to the judicial branch of the Government. That the enactment of said law attempts an usurpation of the judicial power vested by the Constitution in the judiciary. That petitioner further represents that there is no redress which can be invoked by your petitioner, except by the remedy in the extraordinary writ here sought.

That each of the offenses defined in the law as a ground empowering the Postmaster General to exclude the offender from the mails is a criminal offense punishable under the laws of the United States, and provides thereby complete protection and the agencies of punishment to the Government.

That since the passage of the bill hereinbefore referred to as the Espionage Bill, there has been enacted into law a bill commonly known as the Trading with the Enemy Act, which in part provides as follows:

"And it shall be unlawful for any person, firm, corporation, or association, to transport, carry or otherwise publish or distribute the same, or to transport, carry, or otherwise publish or distribute any matter which is made non-mailable by the provisions of the Act relating to espionage approved June 15, 1917."

11 That the effect of said provision is to not only, as under the circumstances above related, empower the Postmaster General of the United States to exclude matters such as therein described and referred to from the mails, but enables him under the provisions of the act above extended to exclude from circulation by other transportation or means of conveyance, or in fact to exclude from the right of publication any such matter as he has declared to be non-mailable. In fact, the Postmaster General having made an order declaring a certain publication to be non-mailable, brings into operation the provisions of the Trading with the Enemy Act, and makes a criminal offense of the publication or delivery by any other means, without any further act or order being issued by him.

That under and by virtue of the provisions of said Trading with the Enemy Act, the Milwaukee Social Democratic Publishing Company is absolutely prohibited from continuing the publication of said Milwaukee Leader or the distribution of the same, and is therefore deprived of the use of its entire property and investment, and is caused to sustain irreparable money loss. That it is advised that it has no remedy by which redress may be had from said damage, unless your Honorable Court grant to it the relief herein demanded by it.

Wherefore, the premises considered, your petitioner prays,

1. That a writ of mandamus may be issued and directed to said Albert S. Burleson, the Postmaster General, commanding him to vacate, rescind and annul the said order denying the use of the mails as second-class matter to your petitioner.

12 2. That a rule may be issued and served upon the said Albert S. Burleson requiring him to appear in this Honorable

Court upon some certain day in said rule to be named, and to answer the premises and show cause why the prayer of this petitioner for the cancellation, annulment and rescission of said order should not be granted.

3. For such other and further relief as your petitioner's cause may require.

MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY,
By ELIZABETH H. THOMAS, *President,*
Petitioner.

CHAS. POE,
H. F. COCHEMS,
H. O. WOLFE,
Attorneys for Petitioner.

STATE OF WISCONSIN,
Milwaukee County, ss:

Elizabeth H. Thomas, being first duly sworn, on oath deposes and says: that she is the president of the Milwaukee Social Democratic Publishing Company, the petitioner in the above entitled action; that the said Milwaukee Social Democratic Publishing Company is a corporation, and that she makes this verification on its behalf, and has authority so to do; that she has read the above and foregoing petition, knows the contents thereof, and that the same is true to her own knowledge, excepting as to those matters therein stated on information and belief, and as to those matters, she believes it to be true.

ELIZABETH H. THOMAS.

Subscribed and sworn to before me this 1st day of November, 1917.

[SEAL.]

LOUIS BAIER,
Notary Public, Milwaukee County, Wisconsin.

My Com. expires January 26, 1919.

13 *Rule to Show Cause.*

Filed November 5, 1917.

* * * * * * *

Upon consideration of the petition of the Milwaukee Social Democratic Publishing Company filed herein this fifth day of November, 1917, it is by the Court this fifth day of November, 1917, ordered that the Respondent, Albert S. Burleson, Postmaster General of the United States, show cause, if any he has, on or before the 16th day of November, 1917, at 10:00 o'clock a. m. why a writ of mandamus should not issue as prayed in said petition, provided a copy of said petition and this rule be served upon said respondent, Postmaster

General of the United States, on or before the 6th day of November, 1917.

WILLIAM HITZ,
Justice.

Marshal's Return.

Served a copy of the within rule and petition on Albert S. Burleson, personally, by service on J. C. Koons, First Ass't Postmaster General on November 6, 1917.

MAURICE SPLAIN,
U. S. Marshal.

O'M.

Answer of Defendant.

Filed November 16, 1917.

* * * * * * *

The respondent, Albert S. Burleson, Postmaster General of the United States, reserving the benefit of exception and obpection to the errors and insufficiencies of the petition for the rule to show cause, and to the jurisdiction of the Court, and to the lack of status of relator to ask for, or to be granted, the rule to show cause,
14 nevertheless, answering the same, states as follows:

One. For the purposes of this suit, he admits the corporate capacity of the relator; that its principal office is located at Milwaukee, Wisconsin; that it has published a daily newspaper known as the Milwaukee Leader for several years last passed, but as to the other matters in paragraph one of the petition alleged, he says that he has no knowledge.

Two. As to the allegation contained in paragraph two of the petition, relative to the amount of money invested in the relator's business, he says that he has no knowledge. As to the allegation of the daily circulation of the relator's daily newspaper known as The Milwaukee Leader, he says that he has no knowledge further than the information contained in sworn statements os to the circulation of said The Milwaukee Leader, on file in the Post Office Department, and as to the allegation that said The Milwaukee Leader circulates throughout the United States, he says that he has no knowledge. He denies the allegation that the relator has complied in every respect with the laws of the Government of the United States so as to entitle the said The Milwaukee Leader to the use of the post office and post roads of the United States as second-class mail matter, but he admits that for several years past, and prior to October 3, 1917, the said The Milwaukee Leader was received and circulated in the mails of the United States as second class mail matter. As to the allegation that the income of said The Milwaukee Leader is vitally dependent upon the privilege of using said mails not only in the matter of the income secured from subscribers to said The Milwaukee Leader, but in the income secured from advertisers, the

procuring of which advertisers is dependent upon the con-
15 tinued right and privilege to use said mails, under a second-class mailing permit, he says that he is without definite knowledge. As to the allegation that the present organization and business of said The Milwaukee Leader is the result of years of organization and enterprise, he says that he has no knowledge.

Three. He admits that on June 15, 1917, there was enacted a law of the United States commonly denominated the Espionage Law, and he admits the accuracy of the copy of the letter, and the receipt of the original by the relator as alleged in paragraph three of the petition.

Four. He admits the accuracy of the copy of the printed slip contained in paragraph four of the petition, and the receipt of the original by the relator.

Five. He admits that Victor L. Berger, the editor of said The Milwaukee Leader, appeared at the hearing in response to the citation in the letter, a copy of which is included in paragraph three of the petition, and he avers that said Berger was accompanied by Seymour L. Stedman, Esquire, Attorney and Counsellor at Law, as counsel for said Berger and for the relator. He admits that the hearing was before the Third Assistant Postmaster General, upon whom, in the due administration of departmental business, the duty of conducting the hearing devolved. He denies that any inquiry was made as to matters concerning the ownership of said The Milwaukee Leader, and the authenticity of certain articles which had appeared in said paper. He avers that the said hearing was conducted in accordance with established departmental practice, after due notice to the relator, and full opportunity afforded it to offer evidence and argument, of which he is advised, it availed itself. He admits that he,
16 while in fact, was not personally present, yet he avers that, in law, he was, officially through his legally constituted representative; the Third Assistant Postmaster General, and he further avers, that in accordance with departmental practice, and also at the special instance and request of relator's representative, the said Berger, this respondent personally considered and reviewed the action of said Third Assistant Postmaster General, and affirmed and approved the same. That any inquiry was made at said hearing of said Third Assistant Postmaster General as to the specific article or offense charged, and that any such alleged reply was made thereto, this respondent, on information and belief, denies.

Six. He admits that the Third Assistant Postmaster General directed a letter to the Postmaster of the City of Milwaukee, Wisconsin, and the accuracy of the copy thereof, as set forth in paragraph six of the petition.

Seven. He admits that F. B. Schutz, Postmaster of the City of Milwaukee, Wisconsin, addressed a letter under date of October 3, 1917, to said The Milwaukee Leader, and he admits the accuracy of the copy contained in paragraph seven of the petition.

Eight. He admits the accuracy and interchange of the telegrams set forth in paragraph eight of the petition.

Nine. He says that the use of the mails has not been forbidden to said The Milwaukee Leader, and he avers that only the second-class

mailing permit of said The Milwaukee Leader has been revoked. As to the other allegations in said paragraph nine of the petition contained he says that he has no knowledge.

Ten. He admits that at the hearing before the Third Assist-
17 ant Postmaster General that the said Victor L. Berger, denied, as also this respondent avers did Seymour L. Stedman, Counsel for Berger, and the said relator, deny, that said The Milwaukee Leader had ever committed any act in violation of the Espionage Law. As to the allegation that petitioner still makes and ever will make such claim, he says that he has no knowledge, and he denies the allegation that at no time since the enactment of the so-called Espionage Law, or at any time prior thereto, that the relator has ever caused to be printed and set forth in said The Milwaukee Leader any article or articles which in any way or manner contain any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, and he avers that on divers occasions, as hereinafter fully set forth, since the enactment of the said Espionage Law the relator has violated not only the provision cited, but other provisions thereof, persistently and flagrantly.

Eleven. As to the allegations contained in paragraph eleven of the petition, he says that he has no definite knowledge.

Twelve. As to the allegation that the International Socialists of the World and the Social Democratic Party of the United States have for many years been the advocates of international peace, he says that he has no definite knowledge. He denies the allegation that said The Milwaukee Leader has at no time published articles tending to breach any of the provisions of the said Espionage Law. He denies the allegation that there were presented no facts to the Postmaster General's Department, or that the Department has in its possession no facts or articles or writings published in said The Milwau-
18 kee Leader which come within the provisions of the said Espionage Law.

Thirteen. As to the allegation that the proceedings of the Postmaster General, his assistants and subordinates, and the order of the Postmaster General's Department, in reference to said The Milwaukee Leader printed and issued by the relator, have destroyed the property of the relator without due process of law, he denies the same, but says that he has no knowledge of the alleged effect of the said order revoking second-class mailing permit of said The Milwaukee Leader.

Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen and Twenty. He says that the allegations contained in paragraphs fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, and twenty of the petition state and incorrectly state mere conclusions of law.

He says that his action in revoking the second-class mailing permit of said The Milwaukee Leader, edited and published by the relator, involved the exercise of judgment and discretion on his part, and, in view of the facts and circumstances before the respondent and the Post Office Department in the instant case, the exercise of the judgment and discretion of the respondent and the action of the respondent are not subject to be reviewed, reversed, set aside or controlled by a court of law, nor can his action in that behalf be commanded, di-

rected, or controlled by the writ of mandamus as the relator in its petition has prayed.

Twenty-one. Yet, further, answering, he says that among other duties, he is required by statute to execute all laws relative to the postal service, to supervise, generally, the business of the Post Office Department and to prescribe regulations for the distribution of such business among the other officials and employees of said De-
19 partment, for its due performance by them.

Matter carried by mail, by the Act approved March 3, 1879 (20 Stat. 359), is divided into four classes; the classification is, by appropriate regulation, assigned to the office of the Third Assistant Postmaster General, under the supervision of this respondent. This classification is based on the character of the matter to be mailed, with rates of postage varying in each class, the lowest rate being that of the second-class, for entry into which certain conditions are prescribed by law. It thus ensues that it is the legal duty of the respondent not only to determine whether these conditions for entry of mail matter into the second class have been fulfilled, initially, so as to entitle the applicant to the privilege of the low rate of postage chargeable in that class, but also to decide, as occasion may arise, whether these conditions either initially prescribed or which may be subsequently imposed by law, are being observed in such manner as to warrant the continued enjoyment of the privilege.

Twenty-two. On the 19th day of December, 1911, there was issued, upon application of relator, by the then Third Assistant Postmaster General, a certificate or permit for the entry of its publication, The Milwaukee Leader, into the mail as second class matter, the conditions precedent to such classification having been fulfilled; this was addressed to the postmaster at Milwaukee, Wisconsin, and was in the usual form, concluding with this provision:

The authority herein given is revocable upon determination by the Department that the publication does not conform to the law,

which action, as respondent is informed and believes, and
20 therefore avers, was duly communicated to said relator by said postmaster through delivery of a true copy of the certificate to it, and said relator thereupon accepted the privilege conferred thereby and continued to enjoy it until on or about the third day of October, 1917, when the same, after a hearing granted the relator, was annulled. And this respondent, while again protesting that his action in the premises, involving the exercise of judgment and discretion in him by law reposed, is not here reviewable, nevertheless further answering says:

As to this Honorable Court is well known, the Congress of the United States of America by joint resolution of April 2, 1917, approved by the President of the United States on the 6th day of April, 1917, formally recognized and declared that a state of war, thrust upon the United States of America by the Imperial German Government, existed between the two governments; and thereafter the Congress by Act approved May 18, 1917, commonly called and known as the Conscription or Draft Law, did authorize the President to increase temporarily the military establishment of the United States, and thereafter by Act approved June 15, 1917—the Espionage Law afore-

said—did, among other things, declare every publication of any kind, in violation of any of its provisions, non-mailable, and did forbid the same to be conveyed in the mails or delivered from any post office or by any letter-carrier; and thereupon it became and was the duty of this respondent, to inquire into and pass upon publications tendered for mailing and to prevent, so far as in him the power lay, the reception in, transmission through, or delivery by the postal service of any such prohibited matter.

21 Twenty-three. From the date of the declaration of war and continuously down to the action of respondent complained of by the relator, this respondent avers that from matter received at the Post Office Department from various sections of the country, he finds that there exists an organized propaganda to discredit and impede in every way the Government in the prosecution of this war, with the purpose of defeating the objects for which the Government is spending billions of dollars and will probably be called upon to sacrifice thousands of lives. The publications forming this propaganda in many cases subtly guard their utterances in the attempt to avoid the criminal liabilities of their acts under said Espionage Law; they are nevertheless united in publishing the same character of matter, whether partially true or entirely false, and are daily accomplishing results in clear violation of law. Among these publications is that of the relator, The Milwaukee Leader, whose editor and controlling spirit is Victor L. Berger, aforesaid, an Austrian by birth but by later naturalization and adoption a citizen of the United States, owing it allegiance and loyalty.

Twenty-four. He, nevertheless, as respondent is informed and believes, and upon such information and belief avers, was one of the committee and draftsmen of a majority report, recommending, as an anti-war proclamation and program of the National Emergency Convention of the Socialist Party at Saint Louis, Missouri, immediately after the declaration of war, that is to say between the seventh day of April, 1917, and the fourteenth day of April, 1917, wherein the following occurs:

We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world;

22 In all modern history there has been no war more unjustifiable than the war in which we are about to engage;

No greater dishonor has ever been forced upon a people than that which the capitalist class is forcing upon this nation against its will.

and among other measures recommended by said majority report were the following:

1. Continuous, active and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.

2. Unyielding opposition to all proposed legislation for military or industrial conscription.

and there were also other recommendations, in the same vein, all of which appeared, at the time, in relator's publication, and which respondent craves leave, if he so desires, to present at the hearing of this action.

Twenty-five. Shortly thereafter, as respondent is advised and believes, and therefore charged, to-wit: On or about April 27, 1917, the relator sought to inaugurate through the mail a chain letter system by depositing in great numbers, circulars addressed to various parties, of which the following is a true copy, to-wit:

Address all communications to The Milwaukee Leader.

The Milwaukee Leader,

Victor L. Berger, Editor.

Daily, except Sunday—20. Phone Grand 5060.

Brisbane Hall, 528-530 Chestnut St.,

Milwaukee, Wisc.

Dear Comrades: When the Socialist Party in convention at St. Louis passed a resolution, calling upon all workers of the world to refuse to fight capitalist wars, they took the boldest and most courageous stand ever taken by a body of men—not excepting the signers of the Declaration of Independence.

The Milwaukee Leader is a paper of the people, by the people and for the people. Although it is not the largest or most powerful paper in America it has the courage to stand by what it believes to be just and right.

23 The powers that forced America into war will do their utmost to destroy the independent press that opposed them. For this reason The Milwaukee Leader needs the support of those it fought for, those who did not want war.

If you admire the opposition the Leader made against war, if you like the stand of the Leader today, if you want a paper in America to continue fighting your battles, will you do your bit to help it? Do this by sending the Leader one new subscription and mail two copies of this letter to others who are interested in our stand. Through a great series of chain letters The Leader can be made America's foremost paper, and a paper whose power will be felt.

While some are working for war, let there be many who will do their bit for humanity.

Yours for peace,

S. AMERINGER.

Twenty-six. By representations and complaints from sundry good and loyal citizens of the United States and from personal reading and consideration of the issues of the said relator's publication, from the date of the declaration of war down to the time of service of

citation upon it, and the hearing granted it in pursuance thereof, wherein in its petition relator complains, it seemed to this respondent, in the exercise of his judgment and discretion and in obedience to the duty on him reposed as well as by the general statutes as by the special provisions of said Espionage Law, that the provisions of the latter act were systematically and continually violated by the relator's publication; therefore he directed the issuance of said citation and the granting of said hearing which was duly and legally done and had by and before said Third Assistant Postmaster General, and upon review and consideration whereof by this respondent, not only in accordance with departmental practice, but at the special instance and request of relator approved the action of the Third Assistant Postmaster General and suspended and annulled the second
24 class mail privilege of relator.

Among other matters and things thus considered by the respondent himself, on such review, and, as he is advised and believes and therefore avers, at the hearing aforesaid, was a file of relator's publications for the three months next preceding the service of the citation upon it, to wit: June 17th, 1917, to September 17, 1917, in which occurred sundry editorials and other statements of the relator's publication.

During said period when the relator's publication was being issued and mailed, the government of the United States was engaged in increasing its naval forces by enlistment and its military forces both by enlistment and by the selective draft, and was also engaged in raising the necessary funds with which to meet its expenses in conducting the said war with Germany by calling upon the citizens of the United States to subscribe for and purchase the bonds of the United States and other forms of certificates of indebtedness of the United States; that during the same period the United States was mobilizing and training its military and naval forces for the conduct of the said war with Germany, and was engaged in calling upon the people of the United States to conserve food and render various services and in general, in mobilizing every resource of the United States and its people for the purpose of a speedy, effective, and successful prosecution of the said war with Germany; that during the said period the armies and navies of the nations cooperating with the United States in the said war with Germany were engaged in military and naval operations against Germany and the Government of the United States was supplying said nations from time to time with funds with which to promote their success against the com-
25 mon enemy of the United States and the said nations cooperating with the United States.

The following are a few excerpts, by date and title, from some of the aforesaid issues of said publication, the issues themselves being hereby tendered, together with the entire file, to the Court:

Issue of June 18th.

Editorial.

An Invitation.

"* * *

"The forces of commercialism are in the saddle. The daily papers, with but few exceptions, are under the control of the war advocates.

"As a result, the people are constantly fed with news and editorials calculated and intended to arouse the war spirit in them.

"They are not permitted to know the real causes and objects of the war.

"The claim is made that the war is being waged for the advancement of democracy, and, at the same time, the fundamental principles of democracy have been violated in our own country, by refusing to permit the people to vote by referendum as to whether or not they want war, and as to whether or not they want conscription, and in many other ways.

"In this situation, it becomes the duty of all those who still retain their senses to do everything in their power to get the truth to the people, to make propaganda in favor of the repeal of the conscription law or its submission to a referendum vote of the people and to promote democracy in our own country."

"* * * *.

2

From the Same Issue.

"A Statement to My People." Taken from an article by Rev. John Haynes Holmes.

"* * *

"On the morning of Sunday, March 7, 1915, I declared in this church my absolute and unalterable opposition to war. 'War' I said 'is never justifiable at any time or under any circumstances. No man is wise enough, no nation is important enough, no human interest precious enough, to justify the wholesale destruction and mur-
26 der which constitute the essence of war—War is hate, and hate has no place within the human heart. War is death, and death has no place within the realm of life. War is hell, and hell has no more place in the human order than in the divine.' I then asked what 'this means in practical terms today?' And I answered 'It means not only that war is unjustifiable in general, but that this English war is unjustifiable for Englishmen, and this German war is unjustifiable for Germans. It means that this war which may in the folly of men come to America tomorrow, is unjustifiable for Americans.'

"These words spoken in this place more than two years ago, I must reaffirm this day. Nothing has happened in this period of time to change my opinion of war. On the contrary much has happened to strengthen and confirm it."

Issue of June 20th.

"Why We Are in This War.

"It is, of course, superfluous to ask our government why we have entered this war. Any student of economics and observer of national and international politics, knows very well why we have entered.

"There are at least six valid reasons. Here they are:

"First. The Entente Allies were practically at the end of their rope. If the United States had not entered, the war would have been over by this time. All our capitalist papers admit this whenever it suits their purpose—they deny it when it does not. About $3,000,000,000 of notes and other obligations which the allied powers owe to Morgan, Schwab & Co.—to the munition makers and exporters of all kinds of war material in America—might not have been worth much over 30 cents if the Allies would have lost this war.

"Second. Industrial stocks of certain kind—commonly called 'war babies' in Wall street—have reached fabulous prices. Their very existence depends upon the continuance of this war. The end of the war means the end of their prosperity. Incidentally we may also observe that there are lots of war glory and promotion to be gotten, too, out of this war—for officers and generals—sons of the capitalist and middle classes. That is a minor matter, however.

"Third. There is absolute freedom from labor troubles during the war. All resistance of the working class is simply put down as 'giving aid and comfort to the enemy' and, therefore, as treason pure and simple.

"Fourth. Under the guise of fighting for democracy in Central Europe, our plutocracy and its government in Washington is now establishing an absolute autocracy in our country with the slogan: war necessitates autocracy. Even such a hot war patriot as Senator Reed of Missouri said that 'no king, czar, potentate, Cæsar or kaiser ever exercised such powers as President Woodrow Wilson.

"• • •"

27 *Issue of July 13th.*

Editorial.

"War and Insanity.

"• • •

"This fact has from time to time been touched upon by writers at the front. It is said that in France there are certain closed cars which are used for the purpose of transporting the insane away from the front, and that there are sometimes long trains made up exclusively of them.

"Capitalism, even in time of peace, is gradually driving the people insane. Year by year, the numbers increase. They have become appalling.

From the Editorial Page of the Same Issue.

By R. A. Dague.

"Seymour Stedman, in an article published recently in The Leader under the caption Democracy for Whom? asks several questions, among which are the following:

"Are we asking for democracy for the Belgian king—and the mangled rubber pickers of the Congo? Democracy for the British king and his underpaid, underfed, undersized, population, most of whom could not be enlisted because their souls and their hearts have been destroyed by a brutual industrial system? Let us hope that may be one of the terms of peace.

"Democracy for India, which has been plundered to the tune of about $1,000,000,000 per year, and where gaunt famine crouches before vast exports?

"Democracy for Ireland, robbed for 700 years, and butchered for her patriotism when she protests?

Whose democracy and liberty is the object of our divine mission, with Elihu Root as the Herald of the dawn?

My father was German; my mother was English. I love the people of both these countries. I am an American but both my patriotism and religion was stated by Thomas Paine, who said: "The World is my country—to do good is my religion."

Issue of July 20th.

Editorial.

"The Russian Constitution."

"* * *

The Constitution of the United States was purposely made difficult to amend, in order that we might not have democracy in this country."

"* * *"

28 *From the Same Issue.*

Editorial.

"Guessing Contest.

The national board for historical service is conducting a prize competition, for teachers on the subject, 'Why the United States is at War.'

"In each state a prize of $150 will be paid for the best guess, and a prize of $75 for the second best guess.

"We call it a guessing contest because it is evident to any sane person that if there were any general understanding as to why the nation is at war there would be no occasion for such a contest. It is

just because most of the people are not able to discern any good reason for our being at war that such a contest is planned.

"No doubt it is expected to gain two objects by means of the contest. First, to get a great number of teachers in favor of the war by throwing out a financial bait to them. Second, to convince others that there is some good reason for our being at war.

We socialists already know quite well why the nation is at war.

It is at war for commercial supremacy as the Chicago Tribune practically admitted some time ago.

We are at war for the financial benefit of the capitalists of the United States. They desire imperialistic dominion, in common with the capitalists of England, in order that together they may control the world and reap fabulous financial gains.

This is the object.

It does not necessarily follow that this will be the result, however of an allied victory. Things do not always turn out as planned.

Any teacher who wants to win a prize had better not give this true reason.

If she does, she will no doubt be awarded the booby prize.

For our dear capitalists don't want the true reason known. That would make the object fail utterly. In order to get the people to support the war vigorously, it is necessary for them to try to fool the people by making them believe that the war has an entirely different object."

From the Same Issue.

Editorial.

"Remember Tonight."

"Again we wish to remind you that the meeting for the organization of the Milwaukee Branch of the People's Council is
29 to be held at the Public Library building this evening.

Never mind the heat. Come anyhow.

It is also hot in the trenches. The high cost of living, and the other evils and sacrifices incident to war, are getting hotter in this country continuously.

The People's Council holds promise of ending these evils, or at least easing them. If public opinion counts for anything, this organization, by focusing the desires of millions of the people for peace, will bring peace sooner than it would otherwise come. So we can afford to brave the heat in order to carry on this exceedingly important work."

Issue of July 31st.

Cartoon of the Liberty Bell.

"The above cartoon was one of the subjects which the post office department considered objectionable in the August Masses and

which caused a decree barring the issue from the mails. A temporary injunction, recently granted by Judge Learned Hand, of the federal bench, has restrained the department from taking action.

Issue of August 1st.

Editorial.

"The International Must Act.

"* * *

"But the French and British have sent their statesmen and generals—and, amid much dining and wining, they have persuaded us not only to give them billions of dollars, but also to send millions of men to go somewhere in France or somewhere in Flanders and die there, in order to break the 'Iron battle line.'

Now, why must we do that? What have the German people—of the same blood as one-fourth of our own people who are closely related and intermarried with the other three-fourths—done to us Americans that we should kill and get killed to please Viviani, Briand and Ribot, and the Right Honorable Mr. Arthur Balfour and Lord Alfred Northcliffe?

"Surely every American wishes from the bottom of his heart that kaiser, junker and plutocrat should disappear from the face of the earth. But these classes in Germany are no worse than the corresponding classes in England or in France. And by killing off millions of German working people—and incidentally also our own—the world will surely not be safer for democracy than before.

"And it is not for our country to convince the Germans by force of arms—a people as intelligent and as educated as ours in every respect—what form of government the Germans are to have.

"If the Germans do not want monarchy and nobility—the Germans must abolish them. It would be just as tyrannical and unjust for us to force upon Germany through terrible bloodshed a certain form of government they may not want, as it would be for the Germans to force it upon us.

"As for democracy—the German Social-Democracy is surely infinitely more democratic than our southern Democrats and more Democratic than Pierpont Morgan and his northern bankers, with Elihu Root and Theodore Roosevelt thrown into the bargain.

"Why not trust to the German Social-Democracy—to change conditions in Germany as the German people will decree?"

"* * *."

Issue of August 2nd.

Editorial.

"Difference of Opinion.

"In the newspapers that are boosting the war there is a very frequent reiteration of the assertion that it is an honor to be drafted.

"Just why is this so often repeated? One would be led by this repetition to believe that there must be some doubt about it. 'He doth protest too much.'

"Among the young men between 21 and 31 there seems to be a different view of the subject. They do not ask each other, 'Have you had the honor to be drafted?'

"On the contrary, the question they ask is, 'Did you escape?' Or, 'Were you caught?' These and questions of similar tenor are the ones you can hear if you mingle with the young men."

Issue of August 3rd.

Editorial.

"The Democracy at Home."

"* * *.

We must never forget that there are about thirty billion dollars to be spent, hundreds of generals and many thousand other officers to be created. If Germany should declare for democracy—we would either 'not believe it,'—we denounce it as a lie, a plot and a new trick—or we would have to fight to 'establish law and order,' to safeguard our future, or fight for any other reason. Otherwise all the 'war babies' in Wall street would die.

"And as for our constitution—everybody who has studied that document and its history knows that 'the men who fashioned the symmetry of the republic' never intended that the constitution should guarantee democratic freedom.

"* * *"

31 "These are the powers of our president in times of piping peace. He has often been called 'the autocrat in a frock coat' to distinguish him from the old world autocrats in uniform.

"But the war legislation that was kicked through the rubber stamp congress during the last five months has added immensely to this supremacy. He now has greater authority than Jenghis Khan, the ruler of the Mongols and the conqueror of the Russians ever possessed. Nevertheless, we realize that Woodrow Wilson must have such surpassing preponderance in order 'to make this world safe for democracy' and also to save the investments and bonds of Pierpont Morgan and his friends.

"The trouble is only that Sir Roger L'Estrange, the European press censor, was right when he said: 'The people have an itch for taking part in the affairs of government.' And some of them still think."

Issue of August 4th.

Editorial.

"Squirming Jingoes.

"It is ludicrous to see the jingoes trying to squirm around the clear opinion of Hannis Taylor holding the conscription law unconstitutional.

"In the article we published he went into the history of the matter and showed that all soldiers and potential soldiers outside of the regular army come under the head of militia. This is well settled by decisions of the courts. To call them a national army does not change the facts. It is a mere evasion. There is no claim made, even by the jingoes, that they are a part of the regular army.

"Under the express terms of the constitution, therefore, the conscript army can be used for three purposes only—to execute the laws of the union, to suppress insurrections, and to repel invasions.

"It follows necessarily that this army can not legally be sent outside of the country. It can only be used for the three purposes mentioned.

"Of course, the jingoes—those of them who are able to understand the legal point involved and the plain wording of the constitution—know full well that such is the case. There are none so blind as those who will not see. They know they will be deliberately violating the constitution if they send this army outside the country. They intend to do it anyhow. And they will try to put on a straight face and pretend to believe that it is entirely in accord with the constitution. They will have some of their legal lights issue longwinded dissertations on the subject in order to save their faces.

"They may even get the supreme court to reverse itself. The judges of the court are in constant association with the class of people who are backing the war, and they might very easily
32 absorb the jingoe sentiment to such an extent that they would decide the case in accordance with prejudice instead of the constitution.

"But we hope not.

"As a matter of fact, the supreme court does not have any legal power to pass upon the constitutionality of laws of congress, but it assumes that power, and we wish it would decide this question right, if it must decide it at all.

"However, the matter ought not to go to the supreme court at all. Since the administration can not but know that the law is unconstitutional, it should settle the matter by obeying the constitution and not sending the troops abroad."

Same Issue.

Editorial.

"Why Not?"

"It is stated 'on the highest official authority'—so runs the report—that the sole object of the United States in the war is to lick Germany.

"From Secretary Lansing's speech and many other sources one gathers the idea that it is the intention of the powers that be in this country to prosecute the war to the point of military conquest. That is, whip Germany to a frazzle, so that Germany can be divided among the allies, or any desired peace terms whatsoever can be positively dictated by the allies and Germany have nothing to say about it whatever.

"This may be only a bluff. We do not pretend to know. Under the vicious undemocratic secret diplomacy system which we have in this country—and in all the belligerent countries except Russia—the slave people are kept in ignorance as to what their masters intend.

"But if such is the intention, we have no hesitation in saying that it is unworthy of a great nation. Peace without victory is just as patriotic now as it was last December.

"Such a course would sacrifice millions of our own young men, and also millions of the men of the other belligerent nations on both sides of the battle line, in a war of subjugation. It is the same object which was sought by the semi-barbarous military chieftains, Alexander the Great and Julius Cæsar. The word 'subjugate' comes from two Latin words, 'sub' and 'jugum,' meaning 'under' and 'yoke.' It therefore means, literally, to bring under the yoke, like an ox, and reduce to utter submissiveness and obedience.

"Are we to spend millions of lives for such a purpose?

"On the contrary, we should make peace just as soon as an honorable peace can be made.

"And from all indications, Germany is ready to make such a peace now.

33 "Let the allies offer to enter into a peace conference. Should such an offer be refused by Germany, the position of the allies would be immeasurably strengthened. But we do not believe it would be refused. We believe it would result in a peace fair to all.

"Why not do it?"

Issue of August 6th.

Editorial.

"The Matter With Russia.

"There is a great deal of discussion going on as to what is the matter with Russia.

"It is quite well recognized that the Russian soldiers are not cowards. They have proved their undaunted heroism too often in the past for anyone to bring such a charge against them.

"Why is it, then, that they give way and retreat, instead of fighting? Lots of people are guessing at the answer to this question. We will add our guess for what it is worth.

"Our guess is that the phenomenon is caused by Russian distrust of the other allies.

"The Russians stated their peace terms—no forcible annexations, no punitive indemnities, free development of all nationalities—with perfect openness and candor.

"They had a right to expect that, if their allies were honest in their intentions, they would unreservedly accept these peace terms.

"But they have not done so.

"On the contrary, the authoritative statements and semi-authoritative statements issuing from the other allied countries, while not open and frank, always carry the idea that military subjugation must be had before peace will be considered.

"In other words, the other allies are bent upon conquest.

"The Russians begin to realize this. And they ask themselves, 'Why should we fight for aims which are the opposite of the peace terms that we have stated? When a candid acceptance of these terms by our allies would bring peace speedily, and they refuse to accept them, are we not playing into their hands and fighting their battles of conquest if we continue the struggle? Is it not better that we should withdraw, unless they definitely show that their motives are good by accepting these fair terms and at once proposing peace?'

"This is our best guess as to the way the Russian soldiers have sized up the situation.

34 "Certainly if they have access to the capitalist press of the United States, they would get that view. For these papers are full of expressions to the effect that the allies must continue the war until Germany is crushed. They have thrown the 'peace without victory' sentiment into the discard."

From the Same Issue,

Editorial.

"A Big Business War.

"To have it impressed upon one's mind that the war is a war of the big business of one group of nations against the big business of another group of nations, each using the workers to do the fighting and the dying, it is only necessary to attend meetings of big business men.

"We recently had this experience, and we had it rubbed into us good and plenty that it is a business men's war.

"Oh, of course, the big business men do not intend to do the fighting.

"Not on your life.

"In fact, one of the speakers, himself a big business man, in urging them to be liberal financially, frankly said, 'I don't suppose any of you intend to go to the front—I don't intend to.'

"It was quite a safe assumption.

"They will keep at a safe distance. Some of them will make a few financial sacrifices for the time being. Others will make unusually large profits during the war. All of them expect to profit by the war eventually.

"To them, patriotism and profits are the same.

"We have yet to meet anyone who is enthusiastic over the war except big business men, bankers, and their satellities among the lawyers and others. And a great many of these are not enthusiastic over it.

"It is a business man's war, and the object is profits, not democracy."

Issue of August 7th.

Editorial.

"Forces of Evil and Good.

"A short while ago, in an editorial about the People's Council, we said that the forces of evil are thoroughly organized, and that through the People's Council the forces of good are organizing.

"The New York Times quotes this expression and says that, by forces of evil, we mean the mass of the American people, and by forces of good, we mean the anti-patriots and the lovers of Germany.

"Of course the Times is not really under any misapprehension.

"Nevertheless, we are very glad to tell the Times and everybody else what we mean by the forces of evil and the forces of good.

"By the forces of evil we mean the profiteers who forced the United States into the war for their own financial benefit and who are engaged in boosting for the war with all their might. Vast sums of money were loaned to the allies by American capitalists. As there was some danger of the allies being defeated, these immense investments or speculations seemed to be in jeopardy. The munition manufacturers and food speculators were carrying on a thriving trade, making huge profits by helping to kill and maim millions of human beings. The whole capitalist class desired commercial supremacy for the United States in order that they, the capitalists, might get still richer.

"These are the forces of evil.

"They urged us into the war for their own selfish financial interest.

"And they are urging us to stay in the war after we could make an honorable peace, because their selfish financial interest requires that they, in common with the capitalists of England, should conquer the world in order to control the commerce of the world and pile up still more enormous fortunes than they have now.

"By the forces of good, we mean the mass of the American people, who never wanted the war, but had it thrust upon them against their will, and who now want peace.

"The masses of the people are honest. They despise the devious tricky wiles of the capitalists. Unlike the capitalists, they are neither anxious nor willing to fatten off the corpses of their fellow men. They do not relish the idea of our great nation indulging in a war of aggression for the financial benefit of the capitalist class. They want our government to offer peace on fair and reasonable terms.

"But—also, unlike the forces of evil—they are unorganized. For this reason, the war was forced upon them against their wishes. For this reason also they have been unable to make their influence felt for peace.

"The People's Council affords them an opportunity to become

organized and use their influence. Therefore, we say that, through the People's Council the forces of good are organizing."

36 *From the Same Issue.*

Editorial.

"Ain't it Fierce?

"The Jingoes are hunting for a slogan.

"Worse than that. They are wailing for a slogan.

"And we don't blame them. They have a nice big war and no fetching slogan. That is, no slogan that fetches the enthusiasm of the people. As one of them says, 'Make the world safe for democracy' lacks 'kick.'

"We might add that it also lacks truth. But that makes no difference to the jingoes.

"* * *

"Ain't it fierce to have a nice big war and no slogan to fight it with?

"It is plain that we shall have to come to the rescue, like Betsy.

"You hold the baby, jingoes, and we'll make one. We're long on slogans.

"Make the world safe for Morgan's millions!

"Down with democracy, up with autocracy!

"Remember the price of coal!

"He kept us out of potatoes!

"There you are, jingoes. Take your choice. If none of these are suitable, we have lots more in our nut."

Editorial From the Same Issue.

"Who Are They?

"In the recent declaration made by the committee on foreign affairs of the workmen's and soldiers' council in Petrograd, dealing with the coming Stockholm conference, there appears the following significant statement:

The impression is growing that, guided by world imperialists, hands of sabotage are working secretly to destroy the work of drawing together the toiling masses of all countries in behalf of peace.

In considering why the Russians show an indisposition to continue fighting, we recently expressed our best guess to the effect that it is because they suspect the motives of the other allies.

This statement made by the foreign affairs committe of the workmen's and soldiers' council of Russia would seem to bear out our theory.

"It would be interesting to know just who the world im-
37 perialists are who have come under the suspicion of the Russians as trying to sabotage peace.

"Do they include the high officials of the United States who are withholding passports from the Socialist party delegates to the Stockholm conference?

"Have the Russians concluded that these gentlemen are 'world imperialists whose plans of world imperialism might be interfered with if peace should result from the Stockholm conference and who therefore prevent the American delegates from attending?'"

Issue of August 10th.

Editorial.

"Kaiserizing America.

"We hope the new food law may do some good. If the president and his man Hoover reduce the cost of living, so far so good.

"But we desire to call attention to the fact that the passage of this law is a distinct case of Kaiserizing America, even more than it has hitherto been Kaiserized.

"* * *"

Editorial From Same Issue.

"Traducing America.

"Mr. Root says that the only anti-American feeling in Russia 'is among Russian-Americans who swarmed to Petrograd by the thousands and showed their gratitude to our country by traducing her.' Isn't it funny that America was criticized only by those who knew the most about America?

"Isn't it funny that those who had confidence in America were confined to those who knew nothing about America?

"Yet, we do not have to look far for the reason.

"Those who know nothing about America have been fed on misstatements from many sources. They have an entirely erroneous impression of this country. They think it is a great free democracy. They do not know that it is a hide-bound plutocratic republic and that it is a financial autocracy as well as political autocracy.

"But the thousands of Russian-Americans who swarmed to Petrograd and 'traduced' America do know all these things.

"They know about the massacre at Ludlow. They know about the frame-up at San Francisco. They know the conditions in the steel and mining and lumbering and other industries. They know how the capitalists use the police and the troops to put down
38 strikes and keep the workers in subjection. They know how workers are deported from their homes. They know how workers are hanged by the neck until dead. They know how women are denied the ballot. They know how the cost of living climbs, while wages are kept down. They know that every few years there are millions of unemployed who are allowed to starve while the capitalists go serenely on with their lavish merrymaking.

"We imagine that the Russian Americans told some of these

things in Petrograd and that Mr. Root considers this 'traducing' America.

"Wouldn't it be better to try to make America worthy of the good opinion of those who come here from other lands?"

Issue of August Eleventh.

Editorial.

"Gaining Russia's Confidence.

Mr. Root says what the new Russian republic needs most is assurance that America is in the war unselfishly, completely and to a finish, and that it is earnestly and unflinchingly in the war for democracy against autocracy and that it will stand by Russia no matter what the cost.

"Some days ago we expressed our best guess that the 'trouble' with Russia is that she suspects the motives of her allies.

"If we are at liberty to try to get the unexpressed meaning out of Mr. Root's cryptic remarks, they would seem to corroborate our theory.

"It seems from what he says that Russia doubts whether or not the United States is in the war unselfishly. Also that Russia doubts whether or not the United States is in the war earnestly for democracy against autocracy.

"Just how are these doubts dispelled?

"There are two ways in which they may be dispelled.

"One way is by going right ahead with the present hypocritical program, allowing America to remain an autocracy, prosecuting the war for commercial supremacy and world domination, and endeavoring to fool Russia by suave diplomatic utterances which do not mean what they say.

"Another way is by turning about face, establishing democracy in the United States, accepting Russia's peace terms, endeavoring to make peace with the world on those terms, and gaining Russia's confidence by deserving it.

"The latter is what we ought to do.

"The former is what the powers that be are the most likely to do—because they are that kind."

39

Issue of August 13th.

Editorial.

"Golden International Conspiracy.

"That there is a powerful international conspiracy of capitalists and Tories in existence to keep the world at war in order to keep the Socialist movement from taking hold, we have always suspected,

of course. All the clap-trap about 'fight for democracy and against autocracy' is pure swindle and was never even thought of when the war broke out.

"• • • •.

"The fact is the 'Golden International' must have war for a hundred reasons—especially for the one paramount reason—to stop, if possible, the rising tide of Socialism.

"• • • •.

"The government of the United States has already taken steps 'to block the attempt' of the Red rascals of making peace and 'organizing the world on a Socialistic basis.' The English, Russian and French governments are not strong enough, of course, to emulate the noble example of our administration.

"But Sam Gompers has, during the last 30 years and 30 days repeatedly expressed his disapproval of the International Socialist movement and his love for the capitalist form of society."

Issue of August 20th.

Editorial.

"The King Salutes.

"It was so nice of King George of England to salute the American flag.

The American people have been waiting and longing for this soulful hour.

"We remember with keen regret the fact that our boorish forefathers seemed to have an unreasonable grudge against King George the Third. They had a foolish notion that kings were unnecessary. They imagined that, in order to have a democracy, it was necessary to get rid of kings. For a long time the lovely schoolma'ams taught the youth of America that King George was perfectly awful and that we must always revere our heroic ancestors who put a crimp in his ambitious plans.

"But it is a joy to know that it is no longer thus. At least the heinous sin of our revolutionary grandsires have been revealed to us. We now look back with shame upon their dirty deeds.

"And yet, how could they have been expected to know any better?

"They didn't have any Pierponts nor Woodrows to tell them.

"They only had George Washington and Thomas Jefferson and Benjamin Franklin and Thomas Paine and a lot of other similarly prejudiced folk. These guys made unkind remarks about King George. They biased the minds of the people against his gracious majesty.

Oh that Pierpont and Woodrow had been there!

"The whole history of this nation might have been changed. Instead of stealing off in the dark like we did, and leaving England in the lurch, we might today have been proud subjects of King

George, like the people of Ireland and India, who love him like a snake—beg pardon—we meant to say like a father.

"But why mourn for what might have been?

"Let us rejoice and be exceedingly glad that we have at last seen the error of our way, and that, like the prodigal son, we have at length returned to our father, the king, and received his blessing."

Issue of August 21st.

Editorial.

"*It Makes a Difference.*

"* * *

"Now, the situation is different. We are in a war for the benefit of the capitalists of the nation. It may be desirable that certain industries should be taken over in order that the people may be appeased while commercial supremacy is being gained for our plutocrats."

Issue of August 23rd

Editorial.

"*Abolishing the Presidency.*

"* * *

"The President, for example, can and does plunge the nation into a cruel war against its will. That is, he is allowed to conduct the foreign relations of the nation to suit himself, and, by his mistaken policy, to get the nation into a dilemma that results in war. That is one of the respects in which our nation utterly fails to be a democracy.

41 "All along the line, the president has too much power.

"* * *

"Yet we find the president himself, although clothed with and exercising all these autocratic powers, blandly asserting that we are fighting for democracy!

"Learn, brothers of Russia. Learn from us, before it is too late.

Another Editorial from the Same Issue.

"One Instance.

"There comes to our hand The People's Press, published in Cincinnati, Ohio. In it there is an article, presumably written by Herbert S. Bigelow, a part of which we want to give to you.

"Today I called at the home of a mother of an only son who was drafted. Eight years of sacrifice—this father and mother had made—to get this boy through high school and university. He has been

one year out of school and this devoted family of three had begun to enter into the reward of their long labor.

Then the draft came—and the young man was called.

As I took that mother's trembling hand this morning, moist from the wash-tub, and saw the tears coming down her cheeeks as she struggled to say to me what was in her heart, those words of the secretary of War flashed into my mind.

'I am immensely proud of what has been done.'

"Mr. Secretary, if you could have on your heart for one hour the burden now felt by the mothers of America it would crush you.

"Multiply this woman by many thousands and we have a slight realization of the tragedy that is going on in our midst.

"Is it any wonder that those who know the cause and the object of the war feel that all that is sacred in America has been profaned and outraged?"

Editorial from Same Issue.

"Dead as the Mummies.

"We are informed that in Canada the war spirit, with the exception of the newspaper headlines, is as dead as the mummies of Egypt.

"In the United States the war spirit, except in the newspapers, never was any more alive than the mummies of Egypt.

"We are glad to know that it is dead in Canada. We hope it is equally dead in all the other warring nations on both sides of the battle line. If so, it means that the people of all these nations are going to vigorously insist upon peace and compel their various governments to act for peace soon."

42

Editorial from Same Issue.

"Sufficient Reason.

"The debate over the war revenue bill brings out the fact that the first two years of America's participation in the war are expected to result in the expenditure of $40,000,000,000 and in the killing or wounding of 400,000 men.

"We have just one suggestion to make in this connection.

"That suggestion is that you should join the Socialist party and the People's Council, if you have not already done so, and work for peace.

"Is any further argument needed?"

Editorial from Same Issue.

"The New Autocracy.

"* * *

"In the popular phrase of the day, congress has agreed to 'let George do it.' And the result is the creation of a virtual autocracy,

entirely repugnant both to the letter and to the spirit of the constitution. To anyone who ventures to criticize the wisdom of this policy, the only reply vouchsafed is a hysterical appeal to 'stand by the president.'

"• • •.

"Today the case is entirely different. We are threatened by no armed insurrection in the United States and the political heirs of the leaders of the rebellion which Lincoln suppressed are now in power at Washington. We are, however, engaged in an undertaking upon which the framers of the constitution would have looked with horror; namely, military intervention in an European war."

Issue of August 24th.

Editorial.

War Profits.

"Although we always knew the war profits made by the big capitalists of the United States were immense, and it is pretty hard to astonish a Socialist with anything along that line, we shall have to 'fess up to the fact that we are amazed at the colossal profits set forth in the minority report of the committee on finance, submitted to the United States senate by Senators La Follette, Thomas and Gore."

• • •.

"There is no further need to ask why we are at war. In these figures you have the reason. Had the war come to a close, these profits would have been discontinued. Here you have the reason why a desperate effort is made to deceive the people into believing that we are fighting for democracy. Here you have the reason why free speech and free press are curtailed. Here you have the reason why the constitution is being tramped in the mud. Here you have the reason why everyone who wants peace is a traitor.

43

Couple these profits with the loans made to the allies, and the lust for commercial conquest of the world, and you have the whole story. We are at war, sacrificing life, property, comfort and morals, in order that the ravenous greed of the plutocrats of America may be still further satisfied. To call them hogs would be unfair to the four-footed hogs. The four-footed hogs lie down in the slop when they have enough. And the four-footed hogs do not live on carrion either. But these plutocratic beasts never have enough. And they feed upon the corpses of men slain in battle."

• • •.

From the Same Issue.

"Censoring God.

The publishers of Bibles are away behind with their orders. The war created an unprecedented demand for them, especially for the New Testament.

This is good news. We hope the purchasers of these books will read them.

They will probably have to do it on the sly, however. For, as you know, the Bible is treasonable nowadays. It says, "Thou shalt not kill." This infamous doctrine has been put over on the human race for a long time. But our latter day commercial and political saints will have none of it. They are a whole lot wiser than God—who is said to have given the commandment, "Thou shalt not kill" to Moses. They have amended the commandment by striking out the word "not", so as to make it read "Thou shalt kill". Before any more Bibles go to press, we suggest that that word be gouged out of the plate. Of course, it will leave a blank spot on the page. But that's all the better. It will call the attention of the present and future generations to the fact that our wise commercial and political saints overruled God and censored His word.

Then, they must remember that the New Testament reaffirms the above mentioned commandment. But that isn't the worst. It also adds a new commandment—"that ye love one another." Now isn't that horrid? That will have to be gouged out too.

And, while we are about it, let's gouge out the place where it says 'Blessed are the peacemakers for they shall be called the children of God.'

There are a number of other anti-bloodshed and anti-hatred expressions that also call loudly for the chisel. When the cen-
44 sor gets through, it will be a badly speckled book, but it will be safe and highly moral. All the treasonable utterances made by God and His Son will have been eliminated.

And the war fan preachers will no longer be embarrassed every Sunday when they go to read the scripture lesson."

From the Same Issue.

"Home-made Camouflage.

"* * *

Our officials at Washington autocratically refused to refer the question of war or no war to a referendum vote of the people, as requested by vast multitudes of the people, but they try to disguise their autocracy by asserting that it is a war for democracy.

The same officials autocratically enacted the conscription law, in spite of the insistent demand of the people for a referendum vote, but they try to make it appear that the conscripts are to fight for democracy.

The postoffice department autocratically bars from the mails certain papers and periodicals because they stand for genuine democracy, but endeavors to justify it on the ground that it is necessary for the promotion of democracy.

Many scores of newspapers, not wanting the people to realize that the country is engaged in a war for commercial conquest and world imperialism, daily make believe that it is a war for democracy.

They make a big holler about Belgium, and try to justify the deportation of American working men from their homes in the name of democracy.

And so on down the line."

Issue of August 25th.

Editorial.

"Observation."

"* * *.

But what of the great majority of the people who have not displayed the flag in their windows or otherwise? Are they wicked? Are they unpatriotic? Are they pro-German?

Not at all.

The only trouble with them is that they reserve the right to be their own judges as to whether or not the flag is being used for a good purpose. When they believe that it is being used for a bad purpose, they do not want to further that purpose by displaying it. If they believed the purpose to be a good one, the whole city would be fluttering with flags, and no jingo paper would need to say a word in order to have this done. It would be done spontaneously. And the jingo papers wouldn't want it done, for if it were a good purpose they would be opposed to it.

The masses of the American people have the flag in their hearts all right, even though they do exercise their conscientious discretion as to when they shall display it on their houses."

From the Same Issue.

"A Crystal Gazer."

"When it comes to secret diplomacy, our administration at Washington is a past master.

It seems, however, that our administration does not have anything on the foreign office of England in this respect. In an article in London Justice, H. M. Hyndman says:

The one idea of our leading politicians in the foreign office and elsewhere is to take our pay and to lie to us persistently about our own business. That is the plain truth.

Hyndman is himself a war fan. It is therefore, not probable that he would criticize the powers that be in England any more severely than they deserve.

If he can see as far as the expression quoted above would indicate, it would seem that it is high time for him to come out of his three-year trance and throw the whole weight of his influence into the

scale for peace. He is a crystal gazer. The capitalist hypnotists directed him to fix his gaze on the hideous German monster until he forgot all other monsters and came under the spell.

We have a few crystal gazers in this country too. While under the influence, they can see nothing but the German monster. All hideous monsters at home are as if they did not exist.

But we are glad to say that all the Socialists except an insignificant few are clear-headed.

They can't be hypnotized by the capitalist wizards. They know that the greatest enemies of the American people are at home. They know that the war is a struggle of the capitalist class of one group of nations against the capitalist class of another group of nations, and that each side is using the workers for its own purposes. Having grasped this class basis of the struggle, they are proof against the machinations of the fakirs who would hypnotize them and make them dance to the jingo music."

* * *.

46 *Issue of August 27th.*

Editorial.

"Looking for a Place to Light?"

"* * *.

Our own private opinion is that God still believes in the commandment, 'Thou shalt not kill', and in the saying in the sermon on the mount, 'Blessed are the peacemakers for they shall be called the children of God', and that, therefore, if He is taking any part in the matter, He is on the side of the People's Council."

From the Same Issue.

"Cleaning up the World."

"* * *.

Babies dying like flies for lack of the necessaries of life!

Are we not a lovely bunch to start out to compel the world to be good?"

Issue of August 28th.

Cartoon.

"Stimulating Business."

"The decision of the alliance to hold a national conference at Minneapolis, about the time when the People's Council conference was to have been held there, is another action which shows that it is a cheap imitation—with hard emphasis on the word "cheap"; but

don't overlook the word 'imitation' either. If this cheapness does not incur the secret contempt of the alliance's own sponsors, then we overrate their intelligence and self-respect.

We'll bet a pound of flesh that the alliance will be loved and petted by the plutocrats and that it will not have any difficulty in finding a hall to meet in.

Imitation is the sincerest flattery."

From the Same Issue.

"Military Mob Violence."

"* * *.

Professional patriots may rashly applaud the soldier boys for their mob violence.

But soldier boys do not make fine distinctions.

Soldier boys may just as easily break up other lawful meetings.

They may break up meetings held to protest against keeping the president in office for life.

47 They may break up meetings held to prevent the rich from taking away the votes of all citizens having less than $10,000 a year.

Soldier boys on mob violence bent do not discriminate.

Professional patriots take notice."

From the Same Issue.

Editorial.

"The Hun Within."

"Mr. Roosevelt says that our worst enemy is the Hun within our own gates.

This is indeed true. The expression should make a hit.

The Huns within our own gates are those who insist upon a war of aggression and conquest, who curtail the constitution rights of free speech, free press and free assemblage, who deport workingmen from their homes, who oppress the people with high prices, and who rob the whole working class of most of their earnings.

We did not expect the colonel to make such an admission. That he did not mean it so, goes without saying. But the fact remains that the men with whom he is co-operating at the present time are the Huns within."

Issue of August 29th.

Cartoon,

"Hiding 'Slackers.'"

From the Same Issue.

Editorial.

"The President's Reply."

"To all those who expected anything better from the president, whether they be Catholics, Protestants, or otherwise, his reply to the pope will be a great disappointment.

It does not come as a surprise to us, though we tried to hope against hope that he might see fit to make his reply accord with the wishes of the masses of the American people.

For, the masses of the American people want peace. They will agree with most of the censures which are hurled at the kaiser, but they believe that it is, for the most part, a case of the pot calling the kettle black. They realize that secret diplomacy holds sway in all of the allied governments, with the possible exception of Russia. They know that in all of the allied nations, including our own, the people did not want the war. They do not believe the present rulers of any of the belligerent nations—also with the possible exception of Russia—are to be trusted.

48 The reasons given by the president for his unwillingness to enter into peace negotiations at this time, will therefore strike the American people as wholly fallacious, if not indeed ludicrous.

It is necessary that the peace forces of the nation should proceed with redoubled energy to roll up the ever increasing volume of peace sentiment. Eventually, it will become so great that it can no longer be ignored."

From the Same Issue.

Editorial.

"Cheap Imitation."

"The American Alliance for Labor and Democracy, of which Samuel Gompers is chairman and J. G. Phelps Stokes is treasurer, is a cheap imitation of the People's Council, whose full name, as sometimes used, is the People's Council of America for Democracy and Peace.

In its calls for funds, the alliance appeals 'to all friends of international democracy'—another evident effort to imitate the real thing.

Issue of August 30th.

Editorial.

"Grasping at Straws."

"The war boosting newspapers are always on the lookout for arguments with which to attempt to convince the people that the United States had good reason to declare war. They realize that the people feel as Max Eastman does—that whenever there is a war for democracy they will be able to recognize it. So these papers see the need of argument.

With the eagerness with which a dying man grasps a straw, they have seized upon the testy statement which the kaiser is said to have made, 'I'll stand no nonsense from America; America had better look out after the war.'

We do not know whether the kaiser made this statement or not. But, if he did, we do not consider the kaiser a model to pattern after. If it be true that the kaiser went to war because of what he feared might happen to him later, we should not imitate him. It is not only poor morals, but also poor policy, for, if the kaiser had attacked us after the war, he would have had to try the impossible feat of invading America. He himself would then have had the 3,000 mile stretch to cover—not we. Under those circumstances, we could simply have eaten him alive. And, regardless of what they might have thought of the origin of the trouble, the people of this country would not have been lethargic regarding the war, as they are now, because they would have looked upon it as a war of defense.

49 We must also remember that at the time when the remark is alleged to have been made, the United States was pretending to be neutral, while, in fact, assisting the allies by shipping great quantities of munitions and food to them. If the remark was made, this fact no doubt caused it.

* * *."

From the Same Issue.

Editorial.

"Unconstitutional."

"In its pamphlet, 'Conscription and the Conscientious Objector', the American Union Against Militarism, whose address is 70 Fifth Avenue, New York City, includes a memorandum by its attorneys summarizing the grounds upon which they deem the conscription law to be unconstitutional. These grounds are as follows:

1. The conscription law violates article 1 of the constitution, and particularly Subdivision 15 of Section 8 of that article, which confines the purposes for which the militia may be called forth to these three: To execute the laws of the union, to suppress insurrection,

and to repel invasions. Also Subdivision 16, specifically reserves to the states the control of the militia.

2. It violates Article I, Section 1, in that it assumes to delegate to the president the powers specifically reserved to congress, namely, legislative powers and the power to raise and support armies.

3. It violates the thirteenth amendment, which prohibits involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted.

4. It violates the first amendment, which prohibits congress from making any law respecting an establishment of religion or prohibiting the free exercise thereof, in that it assumes to recognize a certain religion and to discriminate in favor of the adherents of that religion by exempting them from service. It denies that 'free exercise of religion' guaranteed by the amendment.

5. It violates the fifth amendment, in that it subjects citizens to deprivation of life, liberty or property without due process of law, since it assumes to confer upon the president discretionary and arbitrary powers in the selection of citizens for drafting into the army.

6. It violates Article IV, Section 4, which guarantees to every state a republican form of government. By the terms of the act, citizens of the various states may be kept in the army in foreign service during 'the period of emergency', which may be forever, subject to military law and possibly under the command of a foreign non-republican government. If 2,000,000 citizens can thus be drafted and kept under martial law, 10,000,000 can be so drafted, and the entire male population may be kept in the army indefinitely, thus substituting military autocracy for the republican form of government.

50 The above are the grounds, as claimed by the American Union Against Militarism.

In this connection, the tenth amendment is also pertinent. It provides that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. This amendment seems to make it clear that when the body of the constitution specifically enumerates three ways in which the militia may be used—to execute the laws, to suppress insurrections, and to repeal invasions—the militia cannot legally be used for any other purpose. It is a very common saying that the government is one of 'enumerated powers.' It can exercise only the powers given, particularly when they are specifically enumerated.

It would seem that any of these grounds would be sufficient to make the law unconstitutional. The cumulative weight of all of them seems to crush it utterly, so far as legal validity is concerned."

From the Same Issue (August 30).

Editorial.

"American Autocracy."

At the same time when the governor of Minnesota was issuing his outrageous order preventing the People's Council from meeting in that state, the Inter-Allied Socialist and Labor conference was meeting in London, England, minus delegates from the United States—and apparently meeting without any effort at illegal suppression on the part of the British government.

The governor said, he was quite sure the meeting would be attended by bloodshed.

Who would shed the blood?

Who would stir up trouble?

Certainly not the members of the People's Council. We do not believe that even the governor would have the hardihood to charge that there was any danger of the members of the Council starting anything of that kind.

Then, it follows that he believed, or at least, pretended to believe, that the war boosters would commit assault and murder.

A fine opinion he has of his own bunch, we must say.

Had he used half as much vigilance to keep his blood-thirsty followers from violating the law as he used in barring the meeting by violating the constitution himself, the meeting could have been held without the slightest danger of trouble.

51 Whether or not his order was made with the connivance of autocrats higher up, we have no means of knowing, but we do know that if those higher up were believers in democracy they would have made a vehement protest against his action.

The people of the United States are not to be put down in this fashion. The powers of autocracy may be supreme for the moment, but, in time, the people are going to put the autocrats out of business and make their own will supreme."

From the Issue of August 31st.

Editorial.

"Something for Nothing."

"* * *.

So far as the conscientious objectors to war in general are concerned, they are faithful folk who try to do their duty. They believe that they serve their country best by taking the position they do. They believe they set the right example to others, and that in the long run their course is the best for the country and the race. Many of them have religious scruples based upon very specific statements in the Bible, such as 'Thou shalt not kill.'

So far as the Socialist conscientious objectors are concerned, as a rule they are not opposed to war. They are opposed to wars that are waged for bad purposes and wars that are waged in the interest of the capitalist class. They are opposed to wars of aggression and wars of conquest. A great many of them would fight in a war for the benefit of the working class, provided it was not a war of aggression. A great many of them would also fight in a genuinely defensive war, even though it might not be distinctly a war for the benefit of the working class. They believe that if they killed men in an aggressive war, it would be murder, and they are, therefore, conscientiously opposed to it."

From the Same Issue.

Editorial.

"Positive and Negative."

"Peace is positive.
War is negative.
Peace is positive because it is constructive.
War is negative because it is destructive.
It has been charged that the Socialists have taken a negative position regarding the war.
This is not true.
It is the jingoes who have taken a negative position. They boost for destruction. The fact that they are engaged in aggressive warfare does not make their position a positive one at all, though it may seem so to the superficial minded.
The peace advocates are the positive forces of the present hour."

52 *From the Same Issue.*

Editorial.

"Remember."

"Remember that the United States Steel Corporation, in addition to its regular profits, made a war profit of $207,945,953 in 1916.
Get those figures fixed in your mind. For they are eloquent. They speak volumes.
It was only one of the many big corporations making war profits.
All the great exploiters are boosting for war.
There's a reason."

From the Same Issue.

Editorial.

"Commanding Respect."

"Mr. S. W. Sutton, East Sound, Wash., sends us the following inquiry:

I believe that, prior to the European war, it was the common practice among the now *pro*-war papers to refer to the revolutionary element of Russia as anarchists or nihilists. Am I right or wrong?

You are right, Mr. Sutton.

But, you see, they were not in power at that time. They were struggling for liberty against the apparently impregnable power of the czar. Those who are now our war fans were co-operating with the czar and his government. They wanted Russian trade and Russian money. They were not interested in liberty for the Russian people.

We doubt if, away down deep, they have changed their opinion in the least. But the situation is different. The czar is now an exile in Siberia, whereto he sent so many others. The revolutionists are in power. Power commands respect. If there is to be further trade, if Russian money is to be guided into *into* the pockets of American capitalists, and if they are to be persuaded to continue at war to help us to achieve commercial conquest, we must play up to them. This involves a total abandonment of the freely displayed contempt of ante-war times when they were not in power, and it involves an assumption of boundless admiration and respect.

Your true capitalist and his kept newspaper are always long on hypocrisy. They will kow-tow to a powerful devil or to a powerful angel with equal urbanity—if there is money in it."

33 *From the Same Issue* (*August* 31).

Editorial.

"Wisconsin Ideas."

"* * *.

Do you often have spells like that, brother? The last sentence of your editorial is true—that we cannot make the world safe for democracy unless we make democracy safe in America. That is exactly what we Socialists contend. The war boosters are totally unwilling to make democracy safe for America.

The methods of the so-called Loyalty League are not to be educational. They are to be miseducational. They propose to use every means, by the use of passion and prejudice, to fool the people. In place of education, they will use vituperation, hatred and the calling of hard names. They will try to arouse all that is ugly and venomous in the people and close their minds to the truth.

There is no danger whatsoever of a revolution in this country unless the war boosters themselves stir it up by their brutal attacks upon the fundamental rights of the people."

Issue of September 13.

Editorial.

"Heard in Wall Street."

"Today our contribution from The Other Side is taken from The Financial World, published in New York, and consists of a reproduction of gossip heard in Wall Street.

You will note that they are discussing peace in the street.

Some time ago we called attention to the fact that the financiers were considering the possibility that their investments in the other belligerent countries may become shaky because of the exhaustion of those countries. The quotation from The Financial World indicates that this discussion is still going on. It seems that no definite decision as to policy has been arrived at.

Meantime, the National City Bank of New York reports that our exports for 1917 to the belligerent countries and to the neutral countries are much greater than in previous years.

This no doubt has a tendency to divide the plutocratic forces on the subject of peace. Yet, the biggest financiers are the money lenders. They rule the roost. And the quoted article states that a falling off of foreign trade is not expected after the war anyhow, on account of the exhaustion of other countries. This being the case, it is altogether possible that those capitalists who are not interested in the manufacture of munitions may one of these days de-

54 *cide that they want peace.*

Notice the last statement in the article. "Before the European nations could get upon their feet in an economic sense, we would be far and away in the lead for the premiership in the world's ocean trade."

Now, the premiership in the world's ocean trade—commercial conquest—is the biggest single factor in the war. Commercial supremacy is what we are fighting for. If the reigning financial kings decide that we have already gained this, and that further fighting would endanger the billions of dollars of loans made to the allies, they will move for peace.

And when they move for peace, peace will come quickly.

At that moment, it will cease to be treason—in the eyes of the kept press—to talk peace. On the contrary, the plute papers will fall over one another to get on the peace band wagon. And they will quickly forget their transparent pretense that we are fighting for democracy."

Twenty-Seven. That the above mentioned articles were not alone considered by respondent but other matter contained in various

issues of said publication but not specifically mentioned above were also taken into consideration in determining the mailable character of the matter being sent through the mails in said publication.

He further says that in his judgment, in their entirety, the issues so presented and considered evince a purpose and intent on the part of the relator to wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, to promote the success of its enemies during the present war and wilfully cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces of the United States, and to wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service and of the United States.

That such matter is in violation of Section 3, Title I, and Sections 1 and 2 of Title XII of the Espionage Act, and is non-
55 mailable.

The respondent further says that for these reasons the said publication is not a "newspaper or other periodical publication" within the meaning of the laws of the United States governing mailable matter of the second class, and the respondent so decided after due and thorough consideration of the matters and things stated herein.

Twenty-eight. And this respondent further submits to this Honorable Court whether in view of the character of those statements thus cited the relator shall be awarded the extraordinary relief of the writ of mandamus; and he prays the same benefit of this answer as if he had been heard, in limine against the issue of said rule, and also as if he had demurred to said petition.

Further answering, respondent, as to each of the allegations of the petition not expressly admitted or denied, says he neither admits nor denies the same, but so far as they are material he demands strict proof thereof.

And having fully answered the rule to show cause, this respondent prays that the petition be dismissed, the rule to show cause discharged, and that this respondent may go hence with his reasonable costs and charges.

(Signed) A. S. BURLESON,
Postmaster General of the United States.

(Signed) JOHN E. LASKEY,
A.,
United States Attorney, D. C.
(Signed) MORGAN H. BEACH,
Of Counsel.

DISTRICT OF COLUMBIA, *To wit:*

I, A. S. Burleson, do solemnly swear that I am the Postmas-
56 ter General of the United States; that I have read the foregoing answer by me subscribed and know the contents thereof;

that the statements therein made as of personal knowledge are true, and those made upon information and belief I believe to be true.

(Signed) A. S. BURLESON.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 16th day of November, 1917.

(Signed) CHARLES E. DUNBAR,
[NOTARIAL SEAL.] *Notary Public, D. C.*

My Commission expires May 18, 1921.

Pleas.

Filed November 19, 1917.

* * * * * * *

Now comes the relator in the above entitled cause, by Charles Poe, Henry F. Cochems and Hubert O. Wolfe, its attorneys and for a first plea to the answer, to the petition heretofore filed herein, says that it never at any time willfully made or conveyed false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and never willfully caused or attempted to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States or willfully obstructed the recruiting or enlistment service of the United States to the injury of the service of the United States; and

2. For a second plea to said answer said relator by its said attorneys says that its said newspaper never contained any matter
57 advocating or urging treason, insurrection, or forcible resistance to any law of the United States; and

3. For a third plea this relator by its said attorneys says that it never used or attempted to use the mail or postal service of the United States for the transmission of any matter declared by title 12 of the Act of the Congress of the United States known as the Espionage Act to be non-mailable; and

4. For a fourth plea this relator by its said attorneys says that the Congress of the United States never in fact vested in the respondent herein the power or authority to determine it or any other citizen had been guilty of the violation of said Section 3 of said Espionage Act; and

5. For a fifth plea this relator says that there never was any hearing of its case by the Postmaster General before the order excluding it from the use of the mails as second class mail matter was issued by the Post Office Department; and

6. For a sixth plea this relator by its said attorneys says that the said Espionage Act and especially and particularly title 12 thereof, is unconstitutional in that it attempts to abridge the freedom of speech and the liberty of the press; and,

7. For a seventh plea this relator says that the Congress of the United States has no power to delegate to the Postmaster General the

judicial function of determining whether the relator had or had not been guilty of a felony; and

8. For an eighth plea this relator by its said attorneys, says that if any duties were imposed upon the respondent herein by said Espionage Act, said duties were purely ministerial and did not in-
58 volve the exercise of such a discretion as to deprive this Court of jurisdiction to review them.

CHARLES POE,
HENRY F. COCHEMS,
HUBERT O. WOLFE,
Attorneys for Relator.

Demurrer to Relator's Pleas.

Filed November 23, 1917.

* * * * * * *

The respondent says that the relator's first, second, third, fourth, fifth, sixth, seventh and eighth pleas are bad in substance.

JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia, Attorney for the Respondent, Albert S. Burleson.

NOTE.—It will be argued, among other things, at the hearing of the above demurrer, that the pleas mentioned therein amount to no more than a demurrer to the return of the respondent.

Supreme Court of the District of Columbia.

WEDNESDAY, November 28th, 1917.

Session resumed pursuant to adjournment, Hon. William Hitz, Justice presiding.

* * * * * * *

Come again the parties hereto by their respective attorneys, whereupon the further hearing of this cause is resumed and after argument, the demurrer of respondent filed herein to the pleas of petitioner filed to respondent's answer, is submitted to the Court. Upon con-
59 sideration of the demurrer of the respondent to the first, second, third, fourth, fifth, sixth, seventh and eighth pleas, heretofore filed to the respondent's answer, and after argument by counsel of the respective parties, it is by the Court, this 28th day of November 1917, adjudged and ordered that the said demurrer be, and the same is hereby sustained; and thereupon the relator did demur, by leave of Court, to said answer, to which said respondent filed joinder. After hearing on said demurrer and the same not being concluded at four o'clock, p. m., it is ordered that the further hearing thereon be resumed Friday next at 10 o'clock, a. m.

Supreme Court of the District of Columbia.

WEDNESDAY, January 16th, 1918.

Session resumed pursuant to adjournment, Hon. William Hitz, Justice presiding.

* * * * * * *

Come again the parties by their attorneys, whereupon, the petitioner having pleaded to the answer of the respondent and upon the sustaining of the demurrer thereto filed by the respondent, the petitioner declined to further plead, and having asked and received leave of Court to demur to said answer of the respondent demurred thereto, and the said demurrer having been fully considered, it is this 16th of Jan'y 1918, Adjudged and Ordered, that the said demurrer be and hereby is overruled, the rule to show cause heretofore issued discharged, and the petition dismissed at the cost of the petitioner.

To the action of the Court, in denying leave to plead over, petitioner's attorney of record Mr. Poe, prays an exception, which
60 is noted. Thereupon, petitioner by his said attorney in open Court, notes an Appeal to the Court of Appeals, and the penalty of a bond for costs is fixed in the sum of One Hundred Dollars, with leave to deposit $50.00 with the Clerk, in lieu thereof.

Memorandum.

January 28, 1918.—Appeal Bond $100 approved and filed.

Assignment of Errors.

Filed February 9, 1918.

* * * * * * *

Now comes the relator by his said attorneys and files the following assignment of errors:

First. The Court erred in sustaining the demurrer interposed by the respondent to the pleas of the relator to the answer;

Second. The Court erred in overruling the demurrer to the answer of the respondent;

Third. The Court erred in refusing to the relator the right to plead over when the court overruled the demurrer of said respondent;

Fourth. The Court erred in discharging the rule to show cause;

Fifth. The Court erred in dismissing the petition with costs;

Sixth. Because said Court thereby sustains an unconstitutional violation of the 1st and 5th amendments to the Constitution of the United States;

Seventh. Because the Court sustains a law conferring power upon Congress to deny to the judiciary its constitutional obligations and functions;

61 Eighth. Because the Postmaster General is sustained by the Court in the exercise of a jurisdiction neither actually conferred, nor impliedly vested.

HENRY F. COCHEMS,
HUBERT O. WOLFE,
CHARLES POE,
Attorneys for Relator.

Service of copy admitted this 9th day of Feb. 1918.

JOHN E. LASKEY,
U. S. Att'y, D. C.

Designation of Record.

Filed February 9, 1918.

* * * * * * *

The Clerk of said Court will prepare the record on appeal herein and include therein,

1. The petition;
2. Rule to show cause;
3. Answer;
4. Pleas to answer;
5. Demurrer to pleas;
6. Order sustaining demurrer of respondent;
7. Minute order as to demurrer of relator and joinder of issue thereon;
8. Order of January 16, 1918 overruling demurrer, discharging rule and dismissing petition and prayers for and allowance of appeal;
9. Mem. approved bond for costs filed;
10. Assignment of errors;
11. This order.

HENRY F. COCHEMS,
HUBERT O. WOLFE,
CHARLES POE,
Attorneys for Relator.

Service of copy admitted: Feb. 9, 1918.

JOHN E. LASKEY,
U. S. Att'y, D. C.

62 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 61, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made

part of this transcript, in cause No. 60784 at Law, wherein The United States of America ex rel. Milwaukee Social Democratic Publishing Company is Plaintiff and Albert S. Burleson, Postmaster-General of the United States, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of the District of Columbia, at the City of Washington, in said District, this 4th day of March, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 3164. The United States of America ex rel. Milwaukee Social Democratic Publishing Co., appellant, vs. Albert S. Burleson, Postmaster General of the United States. Court of Appeals, District of Columbia. Filed Mar. 14, 1918. Henry W. Hodges, clerk.

Monday, March 3rd, A. D. 1919.

No. 3164.

THE UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY, Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States.

The above entitled cause was submitted to the consideration of the Court on the printed record and briefs filed herein by Messrs. Chas. Poe and H. F. Cochems, attorneys for the appellant, and by Mr. J. E. Laskey, attorney for the appellee.

In the Court of Appeals of the District of Columbia.

No. 3164.

UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRAT PUBLISHING COMPANY, Appellant,

v.

ALBERT S. BURLESON, Postmaster General of the United States, Appellee.

Mr. Justice ROBB delivered the opinion of the Court:

Appellant, plaintiff below, petitioned for a writ of mandamus to require the Postmaster General, appellee here, to reinstate its newspaper, the Milwaukee Leader, to the privilege of transportation in the mails as second class matter. An answer was filed and appellant then interposed eight pleas. Appellee demurred, the demurrer was sustained, plaintiff declined further to plead but sought and received leave of court to demur to the answer. After hearing the demurrer was overruled, the rule to show cause discharged, and the petition dismissed.

The Milwaukee Leader is a daily newspaper published at Milwaukee, Wisconsin. (Its editor was recently convicted and sentenced for violation of the Espionage Law). In September of 1917 the paper was notified by the Post Office Department that, in accordance with the Act of March 3, 1901 (31 Stat., 1107), it would be accorded a hearing by the department as to whether its second class mail privilege should be revoked, the contention of the department being that the publication was in conflict with the provisions of the Espionage Act of June 15, 1917 (40 Stat., 217). Appellant sent its editor to Washington and a hearing was had before the Third Assistant Postmaster General. That official, before whom such hearings are held, reached a conclusion adverse to appellant. Upon review by the Postmaster General the decision was affirmed. The

answer alleges that by the representations and complaints of loyal citizens and from personal reading and consideration of the issues of the publication in question, from the date of the declaration of war down to the time of the hearing, "it seemed to this respondent, in the exercise of his judgment and discretion and in obedience to the duty on him reposed as well *as* by the general statutes as by the special provisions of the Espionage Law, that the provisions of the latter act were systematically and continually violated by the relator's publication." Included in the answer are many excerpts from appellant's publication between June 16, 1917, and September 27 of that year. The appellee, in his answer, says that in his judgment these and other articles in appellant's publication evince a purpose and intent on its part "to wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, to promote the success of its enemies during the present war and wilfully cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces of the United States, and to wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service and of the United States."

The constitutionality of the Espionage Act has been sustained by the court of last resort. Schenck v. United States, decided in the Supreme Court of the United States March 3, 1919; Frohwerk v. United States, and Debs v. United States, decided by the Supreme Court March 10, 1919. The hearing accorded appellant amounted to due process. Palmer v. McMahon, 133 U. S., 660; Pittsburgh C. C. & St. L. R. Co. v. Backus, 154 U. S., 421; Londoner v. Denver, 210 U. S., 373; Smith v. Hitchcock, 226 U. S., 53.

Under the provisions of the Espionage Act (Title XII, Sections 1 and 2), every newspaper or other publication in violation of any of the provisions of the act or containing any matter advocating or urging treason, insurrection or forcible resistance to any law of the United States, is declared non-mailable. We shall not review the articles from appellant's publication set forth in the answer, for when they are taken as a whole and considered in connection with the circumstances under which they were printed, we think the conclusion reached by the Postmaster General as to their purpose and effect was warranted. No one can read them without becoming convinced that they were printed in a spirit of hostility to our own Government and in a spirit of sympathy for the Central Powers; that, through them, appellant sought to hinder and embarrass the Government in the prosecution of the war.

There would be no question, in our view, as to the authority of the Postmaster General to refuse the privilege of the mail to many, if not all, of the issues of appellant's publication between the dates mentioned, because they fall within the inhibition of the statute. A more difficult question is presented, however, when we come to consider the right of the Postmaster General to make a blanket order refusing the second class mail privilege to that publication in the future, which in practical effect is a refusal of mail privileges. The statute contains no express grant of such authority. This is signifi-

cant, in view of the fact that Congress deemed it necessary to grant such authority in respect to "any fraudulent lottery, gift enterprise, or scheme for the distribution of money," etc. (Section 3929, R. S.) But if the authority of the Postmaster General in the premises be doubtful, it by no means follows that appellant is entitled to invoke this extraordinary remedy. For three months, at least, appellant's publication had been injecting subtle poison into the public mind, "with intent," as found by the Postmaster General, "to interfere with the operation or success of the military or naval forces of the United States." Mandamus, a remedial process, is awarded not as matter of right but in the exercise of sound judicial discretion and upon equitable principles. Duncan Town Site v. Lane, 245 U. S., 308, and Arant v. Lane, decided by the Supreme Court on March 31, 1919. The settled policy of the appellant having been such as to brand it as a hostile or enemy publication, we are not disposed, in the circumstances of the case, to extend to it the benefits of this equitable remedy. Should it present for transportation in the mails "mailable matter of the second class" (Section 3877, R. S.), and the department should refuse to receive it, a different case would be presented. There is no showing here of such offer and refusal.

The judgment is affirmed, with costs. Affirmed.

Monday, May 5th, A. D. 1919.

No. 3164. April Term, 1919.

THE UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY, Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. JUSTICE ROBB.
May 5, 1919.

In the Court of Appeals of the District of Columbia.

No. 3164.

UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRAT PUBLISHING COMPANY

vs.

ALBERT S. BURLESON, Postmaster General of the United States.

Motion for Writ of Error.

Now comes the appellant in the above entitled cause, and prays the Court for a writ of error to remove the same to the Supreme Court of the United States and to fix the amount of bond for costs.

HENRY F. COCHEMS,
CHARLES POE,
Attorneys.

(Endorsed:) No. 3164. United States of America ex Rel. Milwaukee Social Democrat Publishing Company vs. Albert S. Burleson, Postmaster General of the United States. Motion for Writ of Error. Court of Appeals, District of Columbia. Filed July 10, 1919. Henry W. Hodges, Clerk.

Monday, July 14, A. D. 1919.

No. 3164.

THE UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRAT PUBLISHING COMPANY, Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States.

On consideration of the appellant's motion for a writ of error to remove the above entitled cause to the Supreme Court of the United States and fix the amount of bond for costs, it is by the Court this day ordered that said writ issue as prayed, and the amount of the bond is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America ex Rel. Milwaukee Social Democratic Publishing Company, Appellant, and Albert S. Burleson, Postmaster General of the United States, a mani-

fest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of July, in the year of our Lord one thousand nine hundred and nineteen.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by
CONSTANTINE J. SMYTH,
Chief Justice.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Milwaukee Social Democratic Publishing Company, as principal, and Fidelity and Deposit Company of Maryland, as suret-, are held and firmly bound unto Albert S. Burleson, Postmaster General of the United States, in the full and just sum of Three Hundred Dollars ($300.00) to be paid to the said Albert S. Burleson, Postmaster General of the United States, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventeenth day of July, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Milwaukee Social Democratic Publishing Company, appellant, and Albert S. Burleson, Postmaster General of the United States, a judgment was rendered against the said Milwaukee Social Democratic Publishing Company, and the said Milwaukee Social Democratic Publishing Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Albert S. Burleson, Postmaster General of the United States, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Milwaukee Social Democratic Publishing Company shall prosecute said writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Corporate Seal of the Milwaukee Social Democratic Publishing Company.]

MILWAUKEE SOCIAL DEMOCRATIC
PUBLISHING COMPANY,
By E. H. THOMAS, [SEAL.]
President.

[Seal of the Fidelity and Deposit Company of Maryland.]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By WALDEMAR C. WEHL, [SEAL.]
Attorney-in-Fact.

Sealed and delivered in the presence of
F. W. REHFELD.
LOUIS MAIER.

Approved by
CONSTANTINE J. SMYTH,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] 3164. The United States of America ex Rel. Milwaukee Social Democratic Publishing Company, Appellant, vs. Albert S. Burleson, Postmaster General of the United States. Bond on Writ of Error. Court of Appeals, District of Columbia. Filed July 28, 1919. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3164.

THE UNITED STATES OF AMERICA ex Rel. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY, Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States, Appellee.

Assignment of Errors.

Now comes the appellant by his attorneys and files the following assignment of errors:

First. The Court erred in affirming the action of the Supreme Court of the District of Columbia in sustaining the demurrer interposed by the respondent to the pleas of the relator to the answer;

Second. The Court erred in affirming the action of the Supreme Court of the District of Columbia in overruling the demurrer to the answer of the respondent;

Third. The Court erred in affirming the action of the Supreme Court of the District of Columbia in refusing to the relator the right to plead over when the court overruled the demurrer of said petitioner;

Fourth. The Court erred in affirming the action of the Supreme Court of the District of Columbia in discharging the rule to show cause;

Fifth. The Court erred in affirming the action of the Supreme Court of the District of Columbia in dismissing the petition with costs;

Sixth. Because said Court thereby sustains an unconstitutional violation of the 1st and 5th amendments to the Constitution of the United States;

Seventh. Because the Court sustains a law conferring power upon Congress to deny to the judiciary its constitutional obligations and functions;

Eighth. Because the Postmaster General is sustained by the Court in the exercise of a jurisdiction neither actually conferred, nor impliedly vested.

CHARLES POE,
HENRY F. COCHEMS,
Attorneys for Appellants.

[Endorsed:] No. 3164. The United States of America ex Rel. Milwaukee Social Democratic Publishing Company, Appellant, vs. Albert S. Burleson, Postmaster General of the United States. Assignment of Errors. Court of Appeals, District of Columbia. Filed July 28, 1919. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Albert S. Burleson, Postmaster General of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America ex rel. Milwaukee Social Democratic Publishing Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 28th day of July, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 28th day of July A. D. 1919.

JOHN E. LASKEY,
U. S. Atty., D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul-28, 1919. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages numbered from 1 to 60 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of The United States of America ex rel. Milwaukee Social Democratic Publishing Company, Appellant, vs. Albert S. Burleson, Postmaster General of the United States, No. 3164, April Term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 29th day of July, A. D. 1919.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 27237. District of Columbia Court of Appeals. Term No. 482. The United States of America ex rel. Milwaukee Social Democratic Publishing Company, plff. in error, vs. Albert S. Burleson, Postmaster General of the United States. Filed August 4, 1919. File No. 27237.

INDEX

	Page
Statement of Facts	1
Court Will Review Act of Administrative Officer	2
Use of the Mails is a Valuable Right, a Property Right	6
Postmaster General Without Jurisdiction	9
Freedom of Speech	12
Espionage Act of June 15, 1917, Trading With the Enemy Act of October 6, 1917, and the Sedition Act of May 16, 1918, are in Para Materia Suppressing Communication Entirely, Therefore Unconstitutional	18
Refusal of Court to Review Destroys First Amendment to the Constitution	19
Compulsive Necessities of War	20
Attempt to Suppress by Injunction Unconstitutional	32

LIST OF CASES CITED

Bates v. Payne, 194 U. S. 116	4, 5
Dauphin & Key v. McArthur & Mackay, 203 (D. of C.)	5
Enterprise Sav. Assn. v. Zumstein, 67 Fed., 1000	4
Fairfield Floral Co. v. Bradbury, 89 Fed., 393	4
Froniquet v. Perkins, 7 How., 160; 12 Law Ed. 650	11
Ex Rel Garland, 4 Wall, 333	4
Hoover v. McChesney, 81 Fed., 472	4, 6
Houghton v. Payne, 194 U. S. 88	4
Ex Parte Jackson, 96 U. S. 727	4, 19
In Re Kemp, 16 Wis. 416	27
Lewis Pub. Co. v. Wyman, 152 Fed. 787	11
Magnetic School of Healing v. McAnnulty, 187 U. S. 84	4, 6

Page

In Re Milligan, 71 U. S. Wall 2 8

Masses Publishing Co. v. Thomas J. Patten, U. S. Circuit Court of Appeals in New York 33

Mo. Drug Co. v. Wyman, 129 Fed., 623 4

Nat'l Ry. Pub. Co. v. Payne, 20 App. D. C. 203 10

Noble v. Union River Logging R. R., 147 U. S. 165 6

Ex Parte O'Neil, 22 U. S. 923;40 Amer. St. Rep. 770 9

Patterson v. Colorado, 205 U. S. 467 (1907) 32

Payne v. Nat'l Ry. Pub. Co., 20 App. D. of C. 581 4

Public Clearing House v. Coyne, 194 U. S. 497 5

Ex Rel Rapier, 143 U. S.110 ..... 4, 19

Pub. Co. v. Payne, 20 App. D. C. 203 8

In Re Milligan, 71 U. S. (Wall) 2 ..... 10, 21, 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 482

THE UNITED STATES OF AMERICA EX REL. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY,
Appellant.

vs.

ALBERT S. BURLESON, POSTMASTER GENERAL OF THE UNITED STATES,
Appellee.

APPELLANT'S BRIEF AND ARGUMENT.

The facts in the pleadings show that said relator is a daily newspaper published in the City of Milwaukee, Wis., and has been for many years past; that it has a circulation in excess of thirty thousand (30,000) copies, of which about nine thousand (9,000) circulate through the mails; that its circulation extends throughout the United States; that it is absolutely necessary that the use of the mails as second-class mail matter should be preserved to said newspaper, if it is not to be commercially destroyed; that said newspaper is owned by about twelve thousand (12,000) stockholders; that said newspaper circulated uninterruptedly until it received the letter from the Postmaster of the City of Milwaukee informing said relator that said Postmaster had been directed by the Postmaster General of the United States to exclude said newspaper from the use of the mails as second-class mail; that on the day designated for the pretended hearing before the Postmaster General, Victor L. Berger, Managing Editor of said newspaper, made the following offer:

> "If it is necessary for the existence of the *Leader* to keep—to change my policy, I will do that. I owe it to them who have put their money into it. I believe in these principles, but if you think it is necessary; that our country will be harmed; that our Government will suffer, if I continue on

these lines—on this line of editorials, I will give them up." Respondent after the reading of certain printed articles declined to specify or indicate upon request which of said articles violated any provision of said Espionage Act, and what particular section of said Act, merely generally declaring that "the tendency of the paper is seditious." We have then an admitted state of facts, save that the respondent denies that he declared the offense as indicated by general tendency of the paper to be seditious. We have, moreover, the admitted fact of irreparable injury, unless relief can be had by the writ prayed for.

INVOLVES A FUNDAMENTAL RIGHT.

COURT WILL REVIEW ACT OF ADMINISTRATIVE OFFICER.

The general body of the Constitution of the United States provides for the organization of the Government into three distinct divisions: the legislative, executive and judicial; upon the respective branches, the federation of States, conferred certain powers and invested them with certain clearly defined responsibilities. In the unfolding of the process of government each repository of this delegation of power has guarded such powers against invasion with tolerant but firm jealousy. After agreement upon the text of the Constitution there were passed the first group of the articles of declarations of rights, and in the First Amendment, the first article of the bill of rights, appear the guaranties against invasion of the freedom of religion, the right to petition and assemble, and the abridging of the right of free speech and of a free press. The guaranties appearing in the bill of rights, proclaim the fundamental rights, the shelter and protection of the Constitution, the most solemn responsibility of the judicial branch of the Government. Section 8 of Article 1 of the Constitution provides in the general empowering section to Congress, among other powers the power to "establish postoffices and postroads." This power is not granted to Congress as an isolated grant, distinguished from the other general grants of legislative power; it is but ***one of the numerous*** designated powers conferred by that section. In the exercise of its power, Congress has not only created a system of postoffices and post-

roads, but has created a Land Department, a Patent Department, a Military and Naval Department, and various other departments of the Government, all of which in the administration of their respective jurisdictions deals with rights of the citizen. In the administration of the various departments there arises a multitude of casual and incidental questions, all touching in some relation the liberties and the property of the citizen. There have always been certain property rights determined by the various departments which in the exercise of the legislative or executive power were of that character ordinarily occurring in the administration of the business of government, out of which from time to time citizens claiming to be aggrieved have invoked the power of the judicial branch of the Government, claiming such administrative action deprived them of property without due process of law. Wherever the judicial power has been invoked on such appeal from the action of the administrative officers, the courts have recognized as a matter of ***practical conveniences*** the desirability of declining to interfere ***unless such decision concerned a fundamental right of the citizen or showed a manifest violation of the rights of the citizen.*** The rule has been variously stated. Generally it has been declared by the courts that they will not interfere with the action of an administrative officer in the exercise of a power delegated to him by Congress, unless such action by the administrative officer is ***ministerial,*** as distinguished from the act of an administrative officer which involves the exercise of a ***discretionary*** judgment. This rule of practicable convenience has been essential to save the judicial branch of the Government from being harassed with innumerable casual and private matters.

It is to be observed, however, that in all of the appeals from the acts of administrative officers, while the judiciary has with a generous tolerance declined to interfere, as above indicated, yet throughout the cases involving the respective functions of the judicial or legislative branch, a zone of governmental action of the most sensitive importance, the courts have, despite the declaration of this rule of ***practicable convenience,*** invariably reviewed the facts or the mixed questions of fact and law upon which the decision of the administrative officer rested, and not

infrequently have reversed the action of such administrative officers.

Hoover v. McChesney, 81 Fed. 472.
School of Magnetic Healing v. McAnnulty, 187 U. S. 94.
Payne v. Nat'l. Ry. Pub. Co., App. D. of C. 581.
Ex Rel. Garland, 4 Wall 333.

In the administration of the Postoffice Department there have been involved questions arising under the acts of Congress: 1st, as to the right of admission to the mails, or the exclusion from the mails *generally;* 2d, cases as to the right of admission to the mails or exclusion from the mails in the different postal *classifications*, i. e., first, second and third. These have arisen under the statutes, declaring to be non-mailable matter containing lottery advertisements, or in furtherance of fraud, or as to matter containing certain physical disqualifications for proper admission to mail privileges, or to determine whether certain publications complied with the requirements of the statute admitting to special postal rates.

Following are collated cases which embrace classifications of mail which have become the subject of judicial review:

Ex Partee Jackson, 96 U. S. 727; lottery advertisement.
Ex Rel. Rapier, 143 U. S.; lottery.
Enterprise Sav. Assn. v. Zumstein, 67 Fed. 1000; lottery.
Dauphin v. Key, McArthur & Mackay, 203 D. of C.; lottery.
Mo. Drug Co. v. Wyman, 129 Fed. 623; vitality pills.
School of Magnetic Healing v. McAnnulty, 187 U. S. 94; medical treatment.
Hoover v. McChesney, 81 Fed. 472; lottery.
Bates v. Payne, 194 U. S. 106.
Houghton v. Payne, 194 U. S. 88; serial novels.
Payne v. Nat'l Ry. Pub. Co., 20 App. D. of C. 581; whether time tables are periodicals within right to second-class postal rates.
Fairfield Floral Co. v. Bradbury, 89 Fed. 393; fraudulent scheme to market artificial flowers.

Considering these decisions collectively, it is apparent that judicial review was invoked in behalf of what was essentially a

matter of ***private*** consequence, involving facts of ***obvious*** import, where there was no semblance of the invasion of a fundamental right, of broad public consequence—most of them sought in behalf of a business, sordid in nature. Yet again taking these decisions collectively, it appears that in the McChesney case, the McAnnulty, and in Pub. Co. v. Payne, the action of the administrative officer was reversed, and it is significant that in every one of these cases, whether reversed or whether the court declined to interfere, there was a review of the facts, or questions of law and fact. It is true that in the Zumstein case and in several others, it is held that where Congress has delegated power to the administrative officer to administer the execution of its powers, it is dogmatically asserted that the decision of the Postmaster General in that behalf upon questions of fact is final, and that even where questions of law, or mixed questions of fact and law are determined by the Postmaster General, there is a strong presumption of its correctness. This doctrine finds its strongest expression in Bates v. Payne, 194 U. S. 160, which uses this language:

> "There is a strong presumption of correctness even upon mixed questions of law and fact, and courts will not ***ordinarily*** review it, ***although they have the power and sometimes do.***"

In the case of ***Dauphin v. Key, McArthur & Mackey, 203, D. of C.,*** while thecourt declinedto interfere with the action of the administrative officer, it did so upon the ground that the Fifth Amendment to the Constitution guaranteeing due process of law, "refers to the fundamental rights referred to in the Constitution and not applicable to mere privileges of legislative creation."

So in Public Clearing House v. Coyne, 194 U. S., 497, Justice Brown, in sustaining the action of the Department, says: "If the ordinary daily transactions of a department had to be reviewed * * * the courts would be over-burdened." But in that same decision the court recognizing as heretofore suggested, that through the cases runs this rule of ***practical convenience,*** is on the assumption "that there may be judicial review if wrong is done," a relief manifestly impossible in the instant case, where

irreparable harm is done to the relator. In that same case, quoting the case of Noble v. Union River Logging R. R., 147 U. S. 165, the Court while asserting the rule, indicates that it relates only to harassing and obstructive process in matters of daily transactions, saving in the language of that decision also the judicial right of review by declaring that there may be judicial relief later, and indicates that relief was denied for that reason. The Court further says that it is moved to the rule laid down, "provided there be reserved ultimate recourse to the judiciary."

That the power of the Postmaster General is not free of review is further evidenced in School of Magnetic Healing v. McAnnulty, supra, where after stating that the power of the Postmaster General is the absolute power to make judgments, declares the right of court review where the judgment made by the Postmaster General is wrong in relation to the facts as matter of law, using further this language:

> "The fraud statutes were not intended to cover cases in which the Postmaster General might regard as based on false opinions, but only cases of actual fraud in regard to which opinions formed no basis";

and holds in substance that unless the question may be reduced to one of fact as distinguished from mere opinion, the courts will grant relief.

USE OF THE MAILS IS A VALUABLE RIGHT—A PROPERTY RIGHT.

Again taking the cases collectively as they have developed, the declination of the courts to interfere with departmental decisions has been justified, arguendo, by the phrase characterizing the right to the use of the mails as a privilege which Congress confers through its delegated officers upon the citizen, and which could by the same token be withdrawn from the citizen. This position has been forcibly disapproved in Hoover v. McChesney, supra, in which appears the following language; on page 480:

> "But we submit that it is the exercise, not of an executive power, but of a judicial one, for an executive officer to exclude a citizen from the use of the mail because he, in the opinion of the executive office, at some time previously or

then had been or was violating the law by using the mail in an improper manner by sending non-mailable matter, unless the right to use the mail be a mere 'privilege or gratuity' which may be given or refused at the will of those who control the postal service.

"It is not to be overlooked that the establishment of the postal service and its operation is the exercise of a Governmental function; that the money which pays for this perfect postal system is raised by the postage charged, and all deficits paid out of the common treasury of the United States; that it is a monopoly which excludes not only the States, but all individuals, and that it has become a part of the business operations of the citizens of the United States, and an indispensable part in some kinds of business; and that this right to the use of the mails by sending and receiving mail is a most valuable one to the citizens, and one the depriving of which would destroy the business and the living of very many of the citizens of the United States. This postal monopoly, if granted and exercised by a citizen or a corporation, would, from the fact of its being a monopoly, make it imperative that all persons who paid the postal rates and conformed to the reasonable regulations of the postal service should have a common right to the use of the mails, and that because of the fact of the monopoly thus granted. This right would be protected in the courts if the citizen or the corporation controlling the postal service should attempt to deprive him of it. If the United States Government should hereafter become the owner of all the transportation lines in the United States, and thus the common carrier of the nation, and by law exclude all others from becoming common carriers, it would seem to follow inevitably that the citizens of the United States would have a common right to travel and ship freight over the lines thus owned and operated by the United States, and that all of its citizens, subject to such general laws and regulations as to rates and the operation of the lines as might be enacted and established, would have this common right, and that such a right would be readily recognized as a property right in the citizen, and one of which a particular citizen could not be deprived except by due process of law. We think the right to the use of the mails, though in degree much less valuable than the use of the transportation lines, would be equally a property right, and one which could not be taken away except by due process of law."

This position is sustained strongly in the case of *Nat'l. Ry.*

Pub. Co. v. Payne, 29 App. D. C. 203, in which the right to the use of the mails is unequivocally declared a valuable right and a property right, from which decision no appeal was taken by Postmaster General Payne.

That such right is not a mere privilege and gratuity, but is a property right, is finally determined in the case of *Magnetic School of Healing v. McAnnulty, supra,* which quotes the *McChesney* case with approval as to property right. Clearly it must be so. The postoffices and postroads which were the subject of a charter grant in the colonies, later during the federation became by the Constitution a Federal function. The statutes of the United States make that vehicle and agency of social and business intercommunication a *monopoly* of the Federal Government administered by the *Postmaster General.* Of only secondary consequence in its early history, the right of the mails has become as vital to every interest in the nation, not only to newspapers and periodicals, but to every commercial organization which operates within our boundaries, as is the breath or the blood of the body to the maintenance of life. The withholding of the right to use the mails involves a power to make or destroy any measurable commercial or journalistic institution in the United States. No casuistry or indirection or argument can change this fact.

The conception of the right to the mails as a mere gratuity or license, subject to the arbitrary determination of the Postmaster General, which respondent declares is not subject to review by the courts, is on all fours with the effort made to treat the right of an attorney to practice law as a mere gratuity and license, which position was for all times negatived in the case of Ex Rel. Garland, 4 Wall 333. The position that such right may be treated as a mere gratuity is expressed in both the cases of In re Jackson, 96 U. S. 727 and In re Papier, 143 U. S. 110, in discussing subject matter involving an attempt to conduct lotteries, both of which cases antedated the McAnnulty case.

Tucker on Consitutional Law, Sec. 326, p. 669, says, after discussing the rules sought to be established in the Rapier and Jackson case:

"The case rests simply upon the propriety right of Congress in the mails. It may well be objected that this in-

terpretation of the court is not consistent with its purpose. If the postal power and duty be conferred as an essential facility for the transmission of written and printed intelligence; if without postal facilities the press of the country as the media of information, political or otherwise, be diverted from the mails; if Congress refrains from the use of this postal power and duty so as to interfere with the publication of newspapers and other printed matter, is it not an abridgement of the press by refraining from the exercise of power and the non-performance of public duty just as great as if it absolutely prohibited the transmission? The author therefore would consider this question disconnected with an immoral or criminal use of the mails as an open question for reconsideration by the court."

The only case in the United States we have found raising squarely the constitutionality of an attempt by a legislature to foreclose the right of free press by the suppression of a newspaper, where it at once involved a public right and the enjoyment of a free press, was the State decision in the case of ***Ex parte O'Neill, 22 S. W. 923;*** 40 Amer. State Rep. 776, in which the court said:

"The power to prohibit the publication of newspapers is not within the compass of legislative action in this State, and any law enacted for that purpose is clearly in derogation of the bill of rights (substantially same as federal constitution). The power to suppress, one paper concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise."

It is a persuasive decision.

POSTMASTER GENERAL WITHOUT JURISDICTION.

The jurisdiction of the Postmaster General to determine the admissibility to the mails of matters in violation of fraud orders is founded upon a statute which authorizes the exclusion of such matter upon evidence "satisfactory to him." Sec. 3929, Gen. States Trading-with-Enemy Act confers specific jurisdiction on the President. The only other authority he could have in the instant case is an implied authority from the general terms of the statute authorizing him to exercise the general administration of the affairs of the Department. It is significant that nowhere

in the Espionage Law is there any specific delegation of power to the Postmaster General to determine the mailability or non-mailability of relator's publication, or of any other publication referred to in the bill. It is significant that there is an absence of any empowering provision in the Espionage Law. The violation of law prerequisite to be determined, even if it is assumed that Section 3 of Title I has reference in any way to the mails (of which more hereafter) involves in every instance the commission of the most serious felonies, except murder, capable of commission. It is entirely reasonable to assume that the provision concerning the admissibility to the mail, grounded upon felonies of such serious consequence, were intended to become operative; 1st, by a formal judicial process, or 2d, after a conviction of one of the felonies enumerated.

It was held in the Nat'l Pub. Co. v. Payne, ***supra,*** and in the McAnnulty case, ***supra,*** that the attempted acts of the Postmaster General were ***ultra vires*** and of no valid import. It is incredible that Congress intended to commit so overwhelming a responsibility to an administrative officer or his subordinate in a proceeding having none of the attributes or characteristics of a trial of orderly judicial determination.

Daniel Webster defines a judicial hearing as follows:

> "By the law of the land is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen should hold his life, liberty, and property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature."

The absence of a judicial proceeding stands out in clear and bold relief in the argument of Jeremiah Black in the ***Milligan case, 71 U. S. (Wall) 2.***

The incidents of a real hearing are further set forth in ***Lewis Pub. Co. v. Wyman, 152 Fed., 787,*** at 797:

> "It is therefore impossible to sustain the contention that the order revoking the second-class privilege of complainant was based upon the hearing had in June, 1905, and as it is indisputed that at the hearing had on April 30, and May 1, 1906, complainant was advised that this matter would not be taken up then, but that he would be notified thereafter when to appear for a hearing on that issue, and it never has been so notified, it is impossible for the court to make a finding that there had been any hearing on this issue, within the meaning of the law.
>
> "This conclusion makes it unnecessary to determine whether it is essential in order to constitute a hearing under the act of March 3, 1901, that the publisher be either confronted with the witnesses whose testimony is to be used against him or that he be at least furnished their tesimony and names in order that he may be able to rebut their evidence, if it is possible for him to do so."

Mere appearances in response to process by the relator does not confer jurisdiction upon the Postmaster General, and in no way estops the denial by relator that a hearing was had, for it is a fundamental rule of law that even a voluntary appearance cannot create jurisdiction unless jurisdiction obtains by positive warrant.

Forniquet v. Perkins, 7 How., 160; 12 Law. Ed. 650.

It is true that Congress under the Constitution has the power to create courts of inferior jurisdiction, but by the maddest interpretation of the court in conjunction with the guaranty of due process of law, it will not be said that the pretended hearing before the Third Assistant Postmaster General of the United States, as it appears from the pleadings in this case, complied with even the most primitive requirements of judicial justice. The Postmaster General sits in judgment on the case; he is the prosecutor of the case. There are no pleadings in the case. There was declined even the privilege of having an oral statement by way of a bill of particulars as to what matter it was alleged violated any certain provision of Postal Regulations 481½. No right was provided at the trial of the issues of fact by a jury, which is a constitutional requirement for proof of the

crime of treason; no presentment by a grand jury. The ***plain fact*** of the matter is that a ***citation*** is ***equivalent*** to ***conviction,*** and that the proceeding by which it was pretended to assert the right to strike down not only valuable property rights, developed through years of struggle, as well as the right of the public to keep open the channels of public communication, more broadly stated as a fundamental right of free speech and a free press, is a ***grotesque substitute*** for due process of law. The proceeding was not even dignified by a representative from the Department of Justice, nor by the personal presence of the Postmaster General himself. The record shows the submission of articles, for example, disapproving the Draft Law, all of which preceded the passage of the Draft Act, and coupled with this is the proffer of the general files of the paper covering thousands of pages of printed matter, without so much as definite and specific reference to any matter therein relied on to make proof. It shakes every sense of what is constituted democracy to assume that matters of this consequence were intended by the Espionage Act to be submitted to the tender mercies of a proceeding of this nature, and at a time when the judge and prosecutor represented in the same person, are inevitably subject to the stress and passionate sentiment of the hour.

It is therefore the position of the relator: 1st, ***that Congress did not intend to delegate the exercise of the judicial power involved to the Postmaster General;*** 2d, ***that if Congress did intend to delegate such power to the Postmaster General, it was an attempt to invade the judicial department of the Government, and was a delegation of power in violation of the Constitution.***

FREEDOM OF SPEECH.

Article 1 of the Bill of Rights provides:

> "Congress shall make no law * * * abridging the freedom of speech or of the press."

Abridging is defined in the standard lexicons as meaning any curtailment or limitation upon a right. There are two logically different conceptions of the meaning of the right of free speech; one is that free speech shall be permitted only after subjection to a censorship or other ***preventive*** or prohibitive ***pre-***

liminary license; the other is, as voiced in our Constitution and in the Constitutions of all the States, the free enjoyment of the right of free speech and the unlimited right to the use of the printed page, subject only to punishment for the ***abuse*** of such right, which abuse is referred to often in the older texts as the "licentiousness of the press." This censorship of the press was first inflicted by the Church, and later by the State in England. The State censorship was exercised under a licensing act up to 1695, after which time it ceased entirely.

Says Dicey on "Law of the Constitution," page 259:

> "The refusal of the English Parliament in 1695 to renew the Licensing Act did permanently establish the freedom of the press in England. The fifty years which followed were a period of revolutionary disquiet fairly comparable with the era of the Restoration in France. But the censorship once abolished in England was never revived, and all idea of restrictions on the liberty of the press other than those contained in the law of libel have been so long unknown to Englishmen, that the rare survivals in our law of the notion that literature ought to be controlled by the State appear to most persons inexplicable anomalies and are tolerated only because they produce so little inconvenience that their existence is forgotten."

This right in England, as Schroeder sets forth in his work, "Obscene Literature and Constitutional Law," is not due to an affirmative act of Parliament, but has been uniformly exercised as a privilege by permission which could be "exercised with impunity in spite of parliamentary enactments to the contrary."

The only interference with this right in England has been to redress private wrongs suffered as a result of a publication by punishment if the violation amounted to a crime by the State.

So in this country under the Constitution there can be but one sound construction as to the intended freedom of speech and of the press which was to be enjoyed under the Bill of Rights. It is interesting to observe that even in the government of our colonies there was no infringement of the right of free speech, and the Declaration of Independence, reciting the wrongs suffered by the colonies will be searched in vain to find protest against such wrong.

The alien and sedition laws which lived their allotted hour, expiring by limitation in the year 1801, are the one illustration of the attempt by Congress or the executive to abridge the freedom of the right of speech in this country. President John Adams, irritated by the open discussion and criticism of his administration, fathered the enactment of those laws. One need but review in Wharton State Trials, the trial of the defendants Lyon, or Fries, or Cooper, to learn the gross intolerance which followed upon the passage of the sedition act, to the most modest critics of the administration. The sedition acts were directly responsible for the retirement from power of the greatest political party in the history of the Republic—the Federal Party—which had constructively builded the Government. For 115 years, in time of calm or time of storm, no effort was made to rear again the head of this autocratic power until the Espionage Bill became law on the 15th of June, 1917. The sedition law never reached the Supreme Court of the United States, so that tribunal might determine its constitutionality, but as Story says in his work on the Constitution, its unconstitutionality may have been said to have been determined by the universal reprobation of the people of this country.

> "The sedition act was in the highest degree impolitic, and as the prosecutions under it showed, was susceptible of being used for purposes of oppression and intimidation."
>
> Story on Constitution, Vol. 2, Sec. 1293-4.
>
> See note Vice-President Calhoun to Gov. Hamilton, Aug. 28, 1832.

Says Blackstone:

> "To subject the press to the restrictive power of a licenser as was formerly done before and since the revolution (1688) is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government."

Tucker in his text on Blackstone Commentaries, even contended that discussion of measures of government are never punishable.

In May's Constitutional History, C. 10, it is said:

> "When the press errs, it is by the press itself that its errors are left to be corrected. Repression has ceased to be the policy of rulers, and statesmen have at length fully realized the wise maxim of Lord Bacon, that "The punishment of wits enhances their authority, and a forbidden writing is thought to be a certain spark of truth that flies up in the faces of them that seek to tread it out.'"

One but need read the text of the Virginia and of the Kentucky resolutions, one need but review Madison's report of January, 1800, to see the peril and menace inseparable from an attempt to license and censor the press by arbitrary delegation of power. Madison branded it as unconstitutional upon the ground that it abridged the freedom of speech and of the press.

Says Tucker:

> "To abridge the right of the citizen to discuss orally or in writing and by publication the public acts of the Government and its agents and the attempt to screen themselves from censor by such a law as the sedition law would seem to be clearly within the prohibition of this clause of the Constitution to need further comment. If such law is constitutional, to what can this amendment as to the freedom of speech or of the press look for protection against the powers of Congress?"

Says Cooley:

> "Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights and will be certain to become discontented when their discussion of public matters is sought to be circumscribed by the judgment of others upon their temperance or fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand, and if they exceed all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy than if the terrors of law were brought to bear to prevent the discussion."

No homlier philosophy or sound common sense exists in the public thought of this country than that expressed by Benjamin Franklin. Said Franklin:

"Freedom of speech is a principal pillar of a free government; when this support is taken away, the Constitution of a free society is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the actions of magistrates. This privilege in all ages has been and always will be abused. The best of men could not escape the envy and the censor of the times they lived in. Yet this evil is not so great as it might appear at first sight. A magistrate who aims at the good of society will always have the inclination of a great majority on his side and all posterity will not fail to render him justice. The abuses of the freedom of speech are the excesses of liberty. They ought to be repressed; but to whom do we commit the care of doing it? An evil magistrate entrusted with power to ***punish for words*** would be armed with a weapon the most destructive and terrible. Under pretense of pruning off the exuberant branches he would be apt to destroy the tree."

Cooley declares in his Constitutional Limitations, 604, that the purposes of the guaranties was "to guard against repressive measures by the several departments of the Government by means of which persons in power might secure themselves from just scrutiny and condemnation." This is the unanimous voice of the writers. ***But*** it may be said that the provisions of the Espionage Bill are not a re-enactment of the provisions of the Sedition Law. In fact, in response to a resolution offered in the Senate of the United States by Senator Hardwicke and in the House of Representatives by Congressman Moon, the Postmaster General made reply on the 21st day of July, 1917, as to what action had been taken by the department in this behalf. It is admitted in the communication from the Postmaster General that postmasters under the professed authority of the Act had been instructed to hold publications at the postoffice and thereupon to notify the Postmaster General. In his communication he assures Mr. Moon that the cases are being disposed of as quickly as possible. The Postmaster General declined certain information in regard to his activities upon the ground that public interest precludes a disclosure to Congress, and adds as follows:

"In the administration of this law nothing has been done by this department to suppress free criticism, right or

wrong, of the Government, nor has the department attempted in any way to interfere with the legitimate expression of views which do not coincide with those of the Government in the matter of the war with Germany or any other matter."

And then adds this significant statement, which I ask the Court to especially mark:

"I will state generally with respect to the action of the department that no newspaper or periodical has been denied the privilege of the mails as such. Particular issues of certain publications have been found to contain matter which would interfere with the operation or success of the military * * * and therefore non-mailable under the act in question. Publishers have been so advised whenever they have asked the department for the reasons for declaring their publications non-mailable."

It will be remarked further in this connection that the Postmaster General of the United States, in so far as relator has knowledge, has issued orders to show cause why the certain publication in question should not be denied the right of ***second-class*** mail rating, and has not purported to exclude from the rights to the ***other*** classes of the mails, the publication in question. This is a manifest admission of consciousness by the Postmaster General that the Espionage Act in question delegates to him no specific or implied authority to act. It is an attempt to avail himself of the provisions of the statute, which apparently delegate a general power to him, when the second-class privilege has once been accorded to a paper, to grant a hearing, and upon such hearing to revoke the right of said second-class mail rating, for non-compliance with statutory requirements for second-class right.

The Espionage Law provides for no tribunal to determine the second-class privilege or rating of a publication. It provides that the violation of the Espionage Act shall make ***non-mailable*** any publication violating the provisions contained in the Act. The proceeding is manifestly an effort to ***hook on***, by obvious straining, to the jurisdiction here referred to, in order to invest himself with a pretended jurisdiction to pass upon the mailability or non-mailability of matter referred to in the Es-

pionage Act. And to the extent that his decision is made, it inflicts upon the relator the pains and penalties of commercial ruin, for which no reparation or redress is open to him in the tribunals of this country, except in the instant proceeding before your Honors. But the imposition to such pains and penalties does not exhaust the jeopardy to which he is exposed, for if he has committed any of the violations defined in the Act, he is still subject to the heavy pains and penalties defined for each offense referred to in the Act.

On the 6th day of October, 1917, there became law the "Trading-with-Enemy" Act, passed by the same Congress, the 65th Congress, which had passed the Espionage Bill, and in Section 19 of said Act, referring throughout its entire text to foreign publications, there is embodied the following language:

> "It shall be unlawful for any person, firm, corporation or association to transport, carry or otherwise publish or distribute * * * or to transport, carry or otherwise publish or distribute any matter which is made non-mailable by the provisions of the Act relating to Espionage, approved June 15, 1917."

It is interesting in passing to observe that this Act does provide in certain administrative restrictions placed upon the foreign language papers of the United States, the power in the President to act "upon evidence satisfactory to him," which nowhere appears in the Espionage Act. This provision of the Trading-with-the-Enemy Act is in ***pari materia*** with the section of the Espionage Act relating to non-mailability.

> "All consistent statutes which can stand together, though enacted at different dates relating to the same subject, and hence briefly called statutes in ***pari materia***, are treated perspectively and construed together as though they constituted one act, whether at same or different dates, same or different sessions; more strongly so if passed at the same session. Even if no reference is made to one another, it is presumed that acts at the same session are imbued by the same spirit and actuated by the ***same policy***, and should be construed in light of one another."

Louis Sutherland on Statutory Construction; Vol. 2, page 884; Sec. 443.

Manifestly the provision of the Trading-with-the-Enemy Act is as if it were a section immediately coupled with the non-mailability provision of the Espionage Act. This means that the findings of the Postmaster General declaring a publication to be non-mailable in this proceeding makes it illegal for that publication to transport its publication by any other sort of vehicle of transportation. This Congress cannot do. It is clearly an attempt to place an unconstitutional restriction upon the public press of the country.

The enactment on March 16, 1918, of the so-called Sedition Act confirms this position and shows that the Espionage Act of June 15, 1917, the Trading-with-the-Enemy Act of October 6, 1917, and the Sedition Act of May 16, 1918, are all in ***pari materia*** and should be considered as correlated.

See In re Jackson, 96 U. S. 727, and in re Rapier, 143 U. S. 110, in which the question is conclusively determined that the attempt of the Postmaster General or of Congress, acting through the respondent, to close all avenues of communication or transportation to a newspaper ***is without warrant of law and unconstitutional.*** In fact, in both these cases the sole ground alleged for sustaining the constitutionality of the restriction of Postmaster General to the transmission of lottery advertisements through the mails, is the fact that freedom of speech is ***preserved*** because there are kept open other avenues of communication, and the language is plain that ***if*** the undertaking is made to ***close*** them that the act is unconstitutional.

REFUSAL OF COURT TO REVIEW, DESTROYS FIRST AMENDMENT TO THE CONSTITUTION.

If this Court should find that the decision of the Postmaster General is not subject to review, or sustained on review, it would mean that unless the newspapers of the country act immediately upon decision of the respondent being made, they would be subject: 1st, to the additional penalties imposed by the Trading-with-the-Enemy Act; and thus thrice destroyed and thrice shriven. It is offensive to the spirit of America; it is resented by the free men of this land. It is a surrender to the unfortunate

temptation which in time of stress drives those possessed of temporary power to the exercise of autocratic rule, in order to bend all public and private opinions and sentiment to accord with their own. The *exercise* of this power finds no parallel anywhere among the civilized powers of the earth.

It is in precisely such times as this, when the legislative and executive branches of the government are concerned with the dynamic business of making a successful war that there must be invoked that solemn responsibility of the courts, set aside from the passion and the fury of the fray. Here reposes calmness; here reposes perspective and vision; here reposes the power to weigh those things that affect not only the immediate problems of government, but concern the preservation of the foundations of democracy, embodied in the Constitution. The problem is not one here of whether some patent medicine man fraudulently uses the mails for a vehicle; some lottery crook seeks to abuse the privilege of a preferential right; or a matter of petty and sordid consequence. The question is whether there will be written down now for all time the abrogation by the courts of the land of the guaranties of the First and Fifth Articles of the Bill of Rights; whether it will be written down that the guaranty of free speech and of a free press shall be denied the right of that protection in the courts of the land guaranteed by the Fifth Article of the Bill of Rights, declaring that no liberty or property of a citizen shall be taken without due process of law.

COMPULSIVE NECESSITIES OF WAR.

It is urged that a state of war creates a compulsive necessity under the stress of which surrender of liberty and privilege must be made by the citizen to the requirements of government and the business with which it is engaged. The phrase "Compulsive necessity" will be found, for example, in the decision of Judge Learned Hand of the Eastern District of New York, where it is somewhat discussed in the case against *The Masses* arising under the Espionage Act. Your relator asserts that the judicial rule governing the preservation of the constitutional guaranties, and all of them, is entirely unrelated to the circumstance of peace or war; that the Constitution provides specifically the provisions

touching the right of ***habeas corpus,*** and the provision regarding judicial status in naval or occupied territory or in time of open rebellion. Neither have any proximate or remote relation to the the rights and issues in this proceeding.

The historical setting in the case of ***In re Milligan, 71 U. S. (Wall) 2,*** following immediately the impassioned excitement of the great rebellion, in which there appeared for Milligan, David Dudley Field, Jeremiah Black and James A. Garfield, both in the argument of counsel and in the decision of the court, is such as to give to the decision and to the intrinsic value of the argument of counsel, a value in point of sanctity and solemnity rarely proclaimed by the courts of the nation. Relator rejects the temptation to revamp, to paraphrase and to plagiarize the classically expressed argument and decision in that case by extending here at length the portion of the argument of Jeremiah Black.

Says the Court on page 63:

> "We all know that it was the intention of the men who founded this Republic to put the life, liberty and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the Government, whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent, because their salaries could not be reduced, and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob and beyond the reach of executive influence, it was not intended that they should be wholly responsible. For any willful or corrupt violation of their duty, they are liable to being

impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion and give satisfactory reasons for the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system or organization.

"But our wise forefathers knew that tranquility was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed, that in such times, judges themselves might not be safely trusted in criminal cases—especially in prosecutions for political offenses, where the whole power of the executive is arrayed against the accused party. All history proves that public officers of any government when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit towards actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel and treason and the charges are generally founded upon the information of spies and delators, who make merchandise of their oaths and trade in the blood of their fellow men. During the civil commotions in England, which lasted from the beginning of the reign of Charles I to the Revolution of 1688, the best men, and the purest patriots that ever lived, fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men, the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Nothing has occurred ,indeed, in the history of this country to justify the doubt of judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench is embodied in this simple fact, that if the executive officers of this Government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done, they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals. But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the ferocity of Jeffreys and

Scroogs, the timidity of Guilford, and the venality of such men as Saunders and Wright. It seems necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against his government. To that end they could think of no better provision than a public trial before an impartial jury."

And again on page 75:

"But we shall be answered that the judgment under consideration was pronounced in time of war, and it is, therefore, at least, morally excusable. There may, or there may not, be something in that. I admit that the merits or demerits of any particular act, whether it involves a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspect of the case, with which we have nothing to do here. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.

"There has been and will be another quasi-political argument—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals.

"Nothing that the worst men ever profounded has produced so much oppression, misgovernment and suf-

fering as this pretense of State necessity. A great authority calls it the tyrant's plea; and the common honesty of all mankind has branded it with infamy." And again on page 78:

"That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, must carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is done with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone; but in case of a ***future war*** what results will follow from your decision indorsing the Attorney General's views? They are very obvious. At the instant when the war begins, our whole system of legal government will tumble into ruin, and if we are left in the enjoyment of any privileges at all we will owe it not to the Constitution and laws, but to the mercy or policy of those persons who may then happen to control the organized physical force of the country.

"This puts us in a most precarious condition; we must have war often, do what we may to avoid it. The President or the Congress can provoke it, and they can keep it going even after the actual conflict of arms is over. They could make war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

"To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the

common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they make take advantage of the blindness produced by the blow, to stab it in the back.

"The Convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us wander about in a wilderness of anarchy, without a lamp to our feet, or a guide to our path."

And again on page 84:

"But while they are powerless to do good they may become omnipotent to trample upon innocence, to gag the truth, to silence patriotism and crush the liberties of the country. They would be organized to convict, and the conviction would follow the accusation as surely as night follows the day. A government, of course, will accuse none before such a commission except those whom it predetermines to destroy. The accuser can choose the judges, and will select those who are known to be ignorant, unprincipled and the most ready to do whatever may please the power which gives them pay and promotion. The willing witness could be found as easily as the super-serviceable judge. The treacherous spy and the base informer would stock such a market with abundant perjury; for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical government, with such an engine at its command, would shock the world with the enormity of its crimes."

The doctrine presented by Jeremiah Black was adopted by the Court in brave and unmistakable language. The general contention of the Government in that case was the contention of military necessity, to sustain which various exaggerations

of judicial power as exercised were sought to be established; all rejected by the Court. Said the Court, on page 125:

> "This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and human rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free-men. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of ***habeas corpus***.
>
> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men (founders of the Constitution) foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of Constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United Sates is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences,

> was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."
>
> Opinion, in re Milligan, 71 U. S. Wall. 2.

In re Kemp, 16 Wis., 416, after courageously declaring limitations upon the executive use of the right of ***habeas corpus,*** and expressing the fear of the excesses which might be arrogated to the executive, Paine, J., said:

> "I should regard the establishment of that doctrine as a settled principle of our law, as a calamity little, if any, less to be deplored than the success of the rebellion."

It is interesting in this behalf to call attention to the historical review of the incidents similar to those in the Milligan case, by S. S. Coxe, in his work entitled "Three Decades," as it is also interesting to review the characterization of James G. Blaine in commenting on the treatment accorded to Judge Stone during this same period, because no one will impeach the sterling integrity and loyalty of James G. Blaine, who reviews with trenchant and firm condemnation the excesses to which the passion and fury of war had driven the constituted authorities in the subversion of the constitutional guaranties during that period. So deep was the resentment that in 1862 it was only by chance circumstance that President Lincoln was able to serve a Congress favorable to the administration and in a territory that was whole-heartedly committed to the war and firmly and loyally engaged in holding up the hand of the administration.

It is contended now that anyone who discussed the wisdom or unwisdom of the war is destroying the morale of the people and of the army, and thereby committing an offense in some manner vaguely within the twilight field of offenses defined and referred to in Section 3 of Title I of the Espionage Act. It was common to assert that during the progress of war it is not reasonable

to discuss the ways and means with which the war is being conducted by the constituted authorities of the Government, or to discuss the objective of the war, that is to say, the proper time for the consideration of the procuring of peace, or the conditions upon which various citizens may believe peace could be honorably secured and accepted by this country. The exaggeration of this angle of views has led to a wholesale destruction of the right to assemble and petition in the various portions of the country, with the apparent approval, or at least no expression of disapprobation and condemnation from the constituted authorities. In short, there was sought to be established a basis precluding public discussion which can be founded only upon the assumption of infallibility in action by the Government. This is subversive of the most valuable right, not only to the freedom of the citizen, but would mean the establishment of a principle which would withhold and deny from the Government the illuminating value of adverse criticism. The friend who approves of and criticises nothing in one's conduct is the useless and in the end the base friend. The friend who meets with level glance and frankly and fearlessly expresses disapproval or criticism of conduct is the enduring, the useful and the resolute friend. So is it in government. It has ever been the bane of autocracy and of kingly tyranny that the monarch was surrounded with fawning sycophants, fearful of betraying a difference of opinion, and ever anxious to bend the pregnant hinges of the knee.

During the Mexican War, while the country was engaged in hostilities, Lincoln, Sumner, Clay, Webster and other mighty figures of that day, both on the floor of Congress and in the public forums of the nation, denounced the war, both as to its purposes and its conduct, and all survived to enjoy the sound approval and admiration of their countrymen. It has been so through all the history that ever the "fathers stoned the prophets, while the sons, they blessed their bones."

Lincoln, in 1848, during the Mexican War, before the House of Representatives in opposition to that war, said:

> "At its beginning, General Scott was by this same President driven into disfavor if not disgrace, for intimating that peace could not be conquered in less than

three or four months. But now, at the end of twenty months * * * this same President gives a long message, without showing us that as to the end he himself has an even imaginary conception. As I have said, he knows not where he is. He is a bewildered, confounded, and miserably perplexed man. God grant he may be able to show there is not something about his conscience more painful than his mental perplexity."

The Mexican War was declared on the 11th day of May, 1846, and Daniel Webster, on the 6th day of November, 1846, at Faneuil Hall, Boston, in a public speech, said:

"The Mexican War is universally odious throughout the United States, and we have yet to find any Sempronius who raises his voice for it."

And on September 29, 1847, he further said:

"We are, in my opinion, in a most unnecessary and therefore a most unjustifiable war. I hope we are nearing the close of it. I attend carefully and anxiously to every rumor and every breeze that brings to us any report that the effusion of blood, caused, in my judgment, by a rash and unjustifiable proceeding on the part of the Government, may cease."

Said Clay on the 13th of November, 1847:

"Must we blindly continue to conflict, without any visible object, or any prospect of a definite termination? * * * It is the privilege of the people, in their primary assemblies, and of every private citizen, however humble, to express an opinion in regard to the purposes for which the war should be continued; and such expression will receive just so much consideration as it is entitled to, and no more."

He further offered the following resolution:

"***Resolved***, That we invite our fellow citizens of the United States, who are anxious for the restoration of the blessings of peace, or, if the existing war shall continue to be prosecuted, are desirous that its purposes and objects shall be defined and known, who are anxious to avert present and future perils and dangers, with which it may be fraught, and who are also anxious to produce contentment and satisfaction at home, and to elevate the national character abroad, to assemble to-

gether in their respective communities, and to express their views, feelings and opinions."

Charles Sumner, on November 5, 1846, said:

"The Mexican War is an enormity born of slavery. * * * Base in object, atrocious in beginning, immoral in all its influences, vainly prodigal of treasure and life; it is a war of infamy, which must blot the pages of our history."

Theodore Parker on June 7, 1846, said:

"But why talk forever? What shall we do? In regard to this present war, we can refuse to take any part in it; we can encourage others to do the same; we can aid men, if need be, who suffer because they refuse. * * *

"We can hold public meetings in favor of peace, in which what is wrong shall be exposed and condemned. It is proof of our cowardice that this has not been done before now. We can show in what the infamy of a nation consists; in what its real glory."

"With these doctrines for our guide, I will thank any Senator to furnish me with any means of escaping from the prosecution of this or any other war, for a hundred years to come, if it please the President who shall be, to continue it so long. Tell me, ye who contend that, being in war, duty demands of Congress, for its prosecution all the money and every able-bodied man in America to carry it on if need be, who also contend that it is the right of the President, without control of Congress, to march your embodied hosts to Monterey, to Yucatan, to Mexico, to Panama, to China, and that under penalty of death to the officer who disobeys him —tell me, I demand of you—tell me, tell the American people, tell the nations of Christendom, what is the difference between your American Democracy and the most odious, most hateful despotism, that a merciful God has ever allowed a nation to be afflicted with since government on earth began? You may call this free government, but it is such freedom, and no other, as of old was established at Babylon, at Susa, at Bactrina, or Persepolis. Its parallel is scarcely to be found when thus falsely understood in any, even the worse forms of civil policy in modern time. Sir, it is not so; such is

not your Constitution; it is something else, something other and better than this."

Speech of Sen. Thomas Corwin, Feb. 1847.

The foregoing extract will be found more fully amplified in the brief of Gilbert E. Roe, Esq., in the case of Masses Publishing Co. v. Thomas J. Patten, U. S. Circuit Court of Appeals.

The position of Lloyd George to the policy of the British Government in the Boer War is well remembered history, as follows:

"'The fact is that the war has been forced on us by a Government which has divided three millions of money among its own supporters by a measure carried by a Chamber composed of lords who benefit to the tune of hundreds of thousands of pounds.'"

DuParcq's Life of David Lloyd George; Vol. 2, pages 216 and 217.

"'He (Prime Minister) has led us into two blunders: The first was the war, but worse than the war is the change that has been affected in the purposes for which we are prosecuting the war. We went into the war for equal rights. We are prosecuting it for annexation * * * You entered into these two republics for philanthropic purposes, and remained to commit burglary.'"

Ibid, page 254.

The quotations hereinbefore referred to are recited specifically to show that, only the cowardly lack of true conception as to the right of free speech, but the ***duty*** of exercising that right has been challenged in times of supreme crisis by these great oustanding figures. They establish the precedent for courageous resistance to the intolerance and suppression now sought to be justified by the phrase "Compulsive Necessities of War."

* * *

QUESTION NOW BEFORE THE COURT IS MORE IMPORTANT THAN WAS INVOLVED IN MARBURY V. MADISON, THE DRED SCOTT DECISION, OR ANY OTHER QUESTION HEREOFORE

RAISED CONCERNING THE DESTINY OF DEMOCRACY IN AMERICA.

Attempt to Suppress by Injunction or Preventive Measure the General Issue of the Press Clearly Unconstitutional.

We have heretofore adverted to the two conceptions of the right of free speech; one claiming the right of preliminary censorship to the publication; the other denying such right of censorship, but restraining licentious abuse of the right by punishment.

Patterson v. Colorado 205 U. S., 467 (1907), the Court said:

> "In the first place, the main purpose of such constitutional provisions is to prevent all such previous restraints (italicized in the text of the opinion) upon publication as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. Citing Commonwealth v. Blanding, 3 Pick. 304, 313, 314. Republica v. Oswald, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true, the subsequent punishment may extend as well to the true as to the false. This was the law of libel apart from statute in most cases, if not in all. Commonwealth v. Blandin, ubi sup. 4 Black Com. 150."

Reference to 3 Pick, 304, 314, discloses that that opinion adopted in the Patterson v. Colorado case by our Supreme Court contained after the words "practiced by other governments," as quoted in the Patterson v. Colorado case, the following language:

> "And in early times here, to stifle the efforts of patriotic towards all enlightening their fellow citizens upon their rights and the duty of rulers.
>
> "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms which does not protect him who uses them for annoyance or destruction."
>
> 3 Pickering, 304, 314.

So conclusively it appears that the Supreme Court of the United States has swept aside the pretended right of censorship

or restraint *previous* to publication, adopting the position which since 1688 has been the accepted law of England, as more fully appears in the earlier part of this brief, and establishes the doctrine that the only restraint upon the complete right of free speech and of a free press under the Constitution is the power of punishment for its licentious abuse after the publication has committed the abuse.

In the case of The Masses Publishing Co. v. Patten before the Circuit Court of Appeals in New York, the action of the Postmaster General had reference merely to a single copy, the August number of *The Masses*. In the proceeding now before the Court, the order of the Postmaster General seeks to establish a complete foreclosure and embargo upon all editions of The Milwaukee *Leader*, a plain affront and violation of the unquestioned doctrine established in Patterson v. Colorado. Clearly whatever disposition is made of the rejection of review of the action of the Postmaster General, this rule should entitle relator relief from the embargo upon the future issue of the paper, for which there is no color of warrant to sustain the action of the respondent. Relator is persuaded that the consciousness of this fact persuaded the reply on July 21st, 1917, of respondent to the resolution offered by Mr. Moon in the House of Representatives, denying that any attempt had been made to suppress any newspapers as such, but that the action of the Postmaster General had extended only to special editions of papers. And it is consciousness of this, moreover, that seems to have inspired the declination to indicate by bill of particulars the offense complained of by the papers cited by the Department, and to have inspired the general characterization, "Your files show a general tendency to be seditious." The action of respondent, therefore, is without warrant; it has already stigmatized relator's publication, has already visited upon it severe and irreparable pains and penalties; and if continued, threatens it with utter destruction.

On July 8, 1920, as this brief is written, the ban upon its right to second class mailing privileges is still denied to the Milwaukee Leader by the continuing order of the Postmaster General. This, in addition to the fact that for a continued period the first class mail of the Milwaukee Leader and its officers ad-

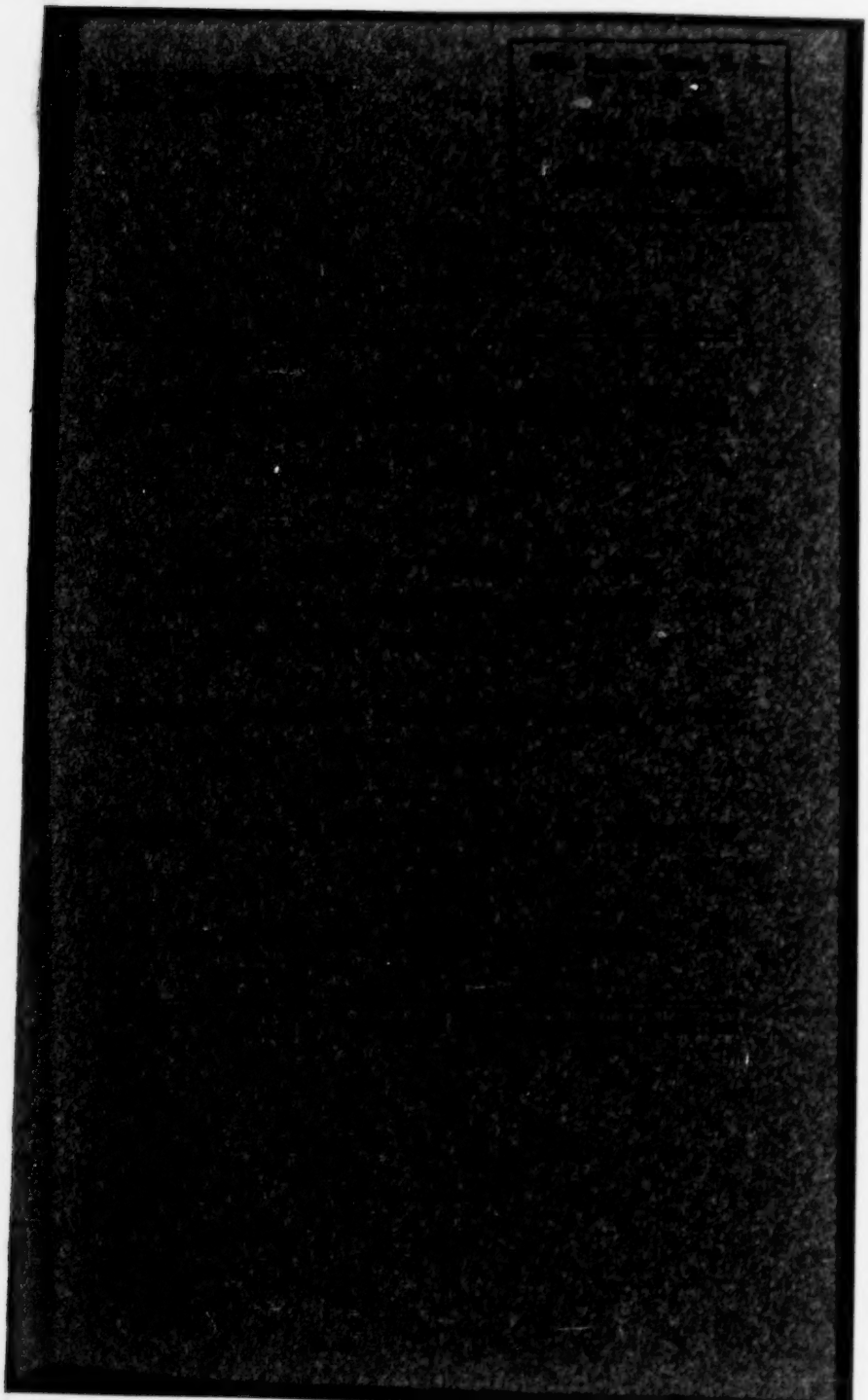
dressed to and from its place of publication were confiscated, while the ban was further extended to exclude the paper from the right to use the Express Companies for shipments, is a tyrannous and intolerable abuse of administrative power.

Dated October 13, 1920.

HENRY F. COCHEMS and
HUBERT O. WOLFE

Attorneys for Relator.

Seymour Stedman,
of counsel



INDEX.

	Page.
STATEMENT OF CASE	1
ESPIONAGE LAW STATED	4
THE PRIMARY QUESTION	8
ARGUMENT ON THE FACTS	12–16
JURISDICTION OF THE POSTMASTER GENERAL	16–19
THE CLASSIFICATION LAW	19–28
All second-class matter must be mailable	21
There must be continuity of lawful issues	22
The Milwaukee Leader was not "being published for the dissemination of information of a public character"	26–28
THE POWER OF THE POSTMASTER GENERAL TO ISSUE AND REVOKE THE SECOND-CLASS MAILING PRIVILEGE	29
POWER OF COURTS TO REVIEW	29–35
THE HEARING	35–38
PLEADING OVER	38–39
CONCLUSION	39

AUTHORITIES CITED.

Abrams v. *United States*, 250 U. S. 616	7, 11
Bates & Guild Co. v. *Payne*, 194 U. S. 106, 107, 109	30–32
Debs v. *United States*, 249 U. S. 211	7, 11
Frohwerk v. *United States*, 249 U. S. 204	7, 11
Horner v. *United States*, 143 U. S. 207; Id. 570	25
Jeffersonian Pub. Co. v. *West*, 245 Fed. 585	24
Lane v. *Mickadiet*, 241 U. S. 201, 209	33–34
Masses Pub. Co. v. *Patten, Postmaster*, 246 Fed. 24, 38	11, 14, 23
Public Clearing House v. *Coyne*, 194 U. S. 497, 508, 509	25–26
Schaefer v. *United States*, 251 U. S. 466, 477	6, 7, 11
Schenck v. *United States*, 249 U. S. 47	7, 11
Smith v. *Hitchcock*, 226 U. S. 53, 60	37–38
Tousey v. *Hitchcock*, 226 U. S. 53, 60	37–38
United States ex rel. Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316, 324	32–33
Act of March 3, 1879 (20 Stat., c. 180, 358, 359), secs. 10, 12, 14	19–20, 23, 26

Page.
Act of March 3, 1901 (31 Stat., c. 851, p. 1107)..... 29, 35
Espionage Law (act of June 15, 1917; 40 Stat., c. 30, p. 217)..... 2, 4–5, 8
Postal Laws and Regulations, 1913, sec. 422; sec. 481½..... 18, 36
Trading with the Enemy Act (act of Oct. 6, 1917; 40 Stat., c. 106, p. 411)..... 4

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA EX REL. Milwaukee Social Democratic Publishing Company, plaintiff in error,
v.
ALBERT S. BURLESON, POSTMASTER-GENERAL of the United States.
No. 155.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff in error, as relator, petitioned the Supreme Court of the District of Columbia for a writ of mandamus to require the Postmaster General to restore the newspaper called the Milwaukee Leader to the privilege of transportation in the mails as second-class matter. The case is before this court upon writ of error to the Court of Appeals of the District of Columbia, which affirmed the decision of the Supreme Court of the District of Columbia overruling the plaintiff in error's demurrer to the answer of the

Postmaster General, discharging the rule to show cause and dismissing the petition.

It appears that the Milwaukee Leader was received and circulated in the mails of the United States as second-class matter under a permit, issued upon request of the plaintiff in error, which contained a provision that "the authority herein given is revocable upon determination by the department that the publication does not conform to the law," and that said permit was revoked on October 3, 1917, on the ground that the publication was in conflict with the espionage law (act of June 15, 1917; 40 Stat., c. 30, p. 217) and not a "newspaper or other periodical publication" within the meaning of the law governing mailable matter of the second-class.

The case being presented on demurrer the averments of the answer stand as true, and the questions for decision here are whether, on the facts stated in the answer, the court will review the judgment of the Postmaster General; and, if the court will review the judgment, whether, on the facts stated in the answer, the Postmaster General should be required to revoke his order excluding the plaintiff in error's paper from the second-class mail privilege. In support of the affirmative of these propositions the plaintiff in error contends that the court has power to review said judgment, and should review it, because it was not based on a hearing as provided by law; because the facts stated in the answer do not show a violation of the provisions of the espionage law relating to newspapers, and the

judgment is therefore unfounded; and because the espionage law is unconstitutional so far as it attempts to forbid the publication of the particular matter prohibited by it, and so far as it denies mailing privileges to newspapers making such publication, thus leaving the action of the Postmaster General without sufficient warrant, even if the plaintiff in error's paper did violate the said law.

In amplification of the foregoing propositions the petition avers that the order of the Postmaster General has destroyed the property of the plaintiff in error without due process of law, deprived the plaintiff in error of the right of free speech, and is destructive of the rights of a free press; that the espionage law does not provide a due process of law to determine whether its provisions have been violated; that the offense defined in the law can only be determined after judicial consideration by a competent tribunal; and that the provisions of said law authorizing the Postmaster General to determine when an offense under said law has been committed do not afford to accused a right to trial in a court of competent jurisdiction. And it is asserted that the duties of the Postmaster General are purely ministerial, and no judicial power is reposed in him by the espionage law to determine issues of fact; that the law enacts authority for the Postmaster General to destroy valuable property upon his mere whim or caprice, and seeks to clothe an executive officer with power necessarily belonging to the judiciary; that each of the offenses for which the Postmaster General can exclude the offender from

the mails under said law are made criminal, and thereby complete protection and the agencies of punishment are afforded to the Government; that under the Trading with the Enemy Act, approved October 6, 1917, 40 Stat., c. 106, p. 411, after the espionage law, it is unlawful for any person to publish or transport any matter made nonmailable by the espionage law, so that in fact the action of the Postmaster General in declaring the Milwaukee Leader to be nonmailable brings into operation the Trading with the Enemy Act and makes criminal the publication or transportation of the paper without any further act or order.

THE ESPIONAGE LAW STATED.

The espionage law, Title I, provides:

> SECTION 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Title XII, of the same act provides:

> SECTION 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. * * *
>
> SEC. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable.

The facts upon which this case is before the court are developed entirely by the petition and answer. Certain alleged facts set up in the petition are either denied in the answer or strict proof thereof demanded, notwithstanding which the brief on behalf of the plaintiff in error treats some such allegations of the petition as established facts. In truth there has been a studied effort throughout the brief to create an atmosphere prejudicial to the Postmaster General and his assistants who, in conformance with their oaths of office, have endeavored in good faith to perform the duties imposed upon them by Congress for the protection of public interests during the greatest war in history, and this is done in

the interests of a publication backed by a set of men standing for a program aptly described by this court in the *Schaefer* case, in which this court said:

> But simple as the law is, perilous to the country as disobedience to it was, offenders developed and when it was exerted against them challenged it to decision as a violation of the right of free speech assured by the Constitution of the United States. A curious spectacle was presented: That great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered Congress to declare war, and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime—that it was an impregnable attribute of free speech upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it, including that in the case at bar. (*Schaefer* v. *United States*, 251 U. S. 477.)

The constitutionality of the Espionage Act is vigorously attacked in the brief for plaintiff in error, but as

this court has sustained its constitutionality in a number of recent decisions, any argument on the part of the defendant in error on that point is unnecessary. *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, id. 204; *Debs.* v. *United States*, id. 211; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466.

The only new feature developed in behalf of the plaintiff in error with respect to the constitutionality of the Espionage Act is the provision in the Trading with the Enemy Act which prohibits nonmailable matter from being published or transported through instrumentalities other than the mails, which it is contended shuts every avenue of transmission to nonmailable matter and it is maintained that this latter act is unconstitutional and renders the espionage law unconstitutional. Even if it were true that this provision of the Trading with the Enemy Act is unconstitutional, which is not admitted, that act having been passed by Congress under the broad war powers conferred upon it by the Constitution, it is nevertheless apparent from an inspection of the record in this case that the point can have no weight. The action of the Postmaster General complained of was prior to the passage of the Trading with the Enemy Act. If the espionage law was valid on October 3, 1917, when the decision of the Postmaster General was communicated, the constitutionality of the proceedings thereunder can not be affected by the Trading with the Enemy Act, passed after that date. However, the whole question here relates solely and

exclusively to the mailing privilege. The only statute which would be involved would be the one which affects the mailability of a paper like the Milwaukee Leader, namely, the provision with respect to the mails in the Espionage Act, the constitutionality of which has already been upheld by this court.

THE PRIMARY QUESTION.

The primary question in this case is, did the Milwaukee Leader violate section 3 of Title I of the said act. Did it (*a*) make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or promote the success of its enemies, or (*b*) wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or (*c*) wilfully obstruct the recruiting or enlistment service of the United States.

As to the meaning of and construction to be placed upon these three classes of offenses it should be observed that to fall within the first class, a statement must be false and may be intended to reach any person whose action might be a factor in the success of the United States in the war. This class is the only one in which the truth or falsity of the statement is an element of the offense, so that if the matter contained in plaintiff in error's paper violated the second and third classes of offenses under the act the truth or falsity of such statement is irrelevant.

The matter contained in the extracts from the Milwaukee Leader set forth in the answer is full of false statements. The court must take judicial notice of the falsity of the statements on at least one topic, i. e., that this war was declared by the United States solely and exclusively for the purpose of protecting the bonds of allied countries held by Morgan and other bankers and the profits of the munition makers. This statement of reason for the declaration of war is in complete contradiction to the resolution of Congress which declared—

> That the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby declared,

and to the statement of the President in his war message which pointed out to the Congress as reasons why the said resolution should be adopted, that the German Empire had made war upon the United States by sinking our ships and taking the lives of our citizens, in violation of accepted principles of international law; that the declaration of Germany for unrestricted submarine warfare was not only an attack upon the United States, in violation of international law, but a demonstration that the peace of the world was necessarily in danger from the existence of an autocratic government which did not abide by international law, and that therefore the world could not be safe for democracy unless the United States successfully accepted the chal-

lenge. Needless to say, not a word about Morgan's bonds or munition makers' profits.

The legislative and executive branches of the Government thus solemnly stated the causes of the war. Can the judiciary hesitate about accepting them as true and properly branding the Milwaukee Leader's statements?

What legitimate purpose could be subserved by the publishing of such false statements? Can it be doubted that the statements tended to interfere with the operation and success of the military forces of the United States and to promote the success of its enemies? If that be their obvious tendency, as we shall hereafter point out, then the intent to accomplish those ends is established and the publication is criminal and not mailable.

The second class of offenses denounced by statute is attempts to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval service of the United States. While such attempt could be made by publication as well as by act, the publication would have to be intended to reach members of the military or naval establishments to predicate an attempt on them. As no such averment is contained in the pleadings, no attempt will be made to establish such an offense.

The third class of offenses declared by the act is the willful obstruction of the recruiting or enlistment service of the United States, to the injury of the service or of the United States. The meaning of

this language is clearly set forth in the decision in a similar case known as the Masses case, 246 Fed. 24:

> If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may willfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest, seems to us too plain for controversy. To obstruct the recruiting or enlistment service, within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient. (*Masses Pub. Co.* v. *Patten, Postmaster*, 246 Fed. 24, 38.)

See also—

Schenck v. *U. S.*, 249 U. S. 47.
Frohwerk v. *U. S.*, id. 204.
Debs v. *U. S.*, id. 211.
Abrams v. *U. S.*, 250 U. S. 616.
Schaefer v. *U. S.*, 251 U. S. 466.

Any utterance, therefore, whose natural effect is to retard or increase the difficulties of the process of raising an army or navy adequate for a successful prosecution of the war would constitute a violation of this clause of the espionage law.

The extracts from the plaintiff in error's publication set forth in the answer speak for themselves. Running through all of them, permeating all of them, and connecting all of them, there is a main, general, or principal theme that the war was entered into by the United States to save the bonds of the allied countries held by Morgan and his Wall Street associates; that this was the purpose of the war, and the statement of any other purpose is false and a piece of fraud and hypocrisy; that the war is for the big capitalists and for them alone, and that the President and Congress of the United States acted simply as the agents or tools of these big capitalists, including the munition makers; that not only was the war begun exclusively for the money profits of these big capitalists, but it is being continued exclusively for that purpose; that these big capitalists do not themselves do the fighting, but use the workers, that is, the working men, to do the fighting and the suffering and the dying, so that these big capitalists can continue their profits by means of this fighting and suffering and dying; that there is an attempt to fool the workers into fighting and dying gladly by fraudulently and hypocritically telling them that this is a war for democracy; that not only is it a war solely and exclusively for plutocracy, but, in order to fight the war for the big capitalists, democracy is being deliberately suppressed and destroyed in the United States. This theme is forcibly, cleverly,

brutally, and unmistakably set forth in page after page of the plaintiff in error's paper.

As the court well knows, and is expressly set forth in the answer, and must therefore be accepted as fact in this review, this theme, with its various variations, was being put forth from day to day during the period when the United States was engaged in raising its Army and Navy to war strength. The Navy was being raised to war strength solely by means of voluntary enlistments; the Army by both voluntary enlistments and draft. The speed and efficiency with which the draft could be executed would depend upon the number of exemptions claimed and the zeal with which the exemptions would be supported and fought for. Therefore, any utterance which would have a tendency to reduce the voluntary enlistments or increase the number and vigor of the exemption claims would inevitably impede and retard, and therefore obstruct the recruiting and enlistment service. The greater number of men called upon for enlistment or draft to join the military or naval forces must necessarily come from the greater number of the population, namely, the working class. Utterances, therefore, likely to reach large numbers of the working class and to influence them against voluntary enlistment or in favor of exemption claims, would necessarily tend to impede and obstruct the recruiting and enlistment service. The plaintiff in error alleges in his petition that the Leader has a circulation of 40,000 and is the organ of a great

number of labor unions, so that the paper during May, June, July, August, and September, 1917, was daily reaching or intended to reach large numbers of men eligible, by reason of age, to military or naval service. To tell these men that they are but cannon fodder to serve a struggle of money kings for money profits, and that they would be fools to believe that the war had any other or less sordid reasons for existence, played upon daily with cleverness and bitterness, obviously would cause many of them to go so far as to resist the draft, and would cause large numbers of them to withhold themselves from voluntary enlistment, and retard the draft services by increasing the claims for exemption and increasing the aggressiveness with which these claims would be supported. To reduce the fighting effectiveness of the United States in this war was the obvious result and the obvious purpose of the persistent, repeated presentation of the theme by the Leader. What other legitimate motive could it have had to fill its columns with this theme day after day during the very period when all the energies of the Government were enlisted in the raising of an adequate Army and Navy? Taking, therefore, the meaning of "obstruct," as laid down by the Circuit Court of Appeals in the *Masses Publishing Company* case and applying that definition to the matter contained in the plaintiff in error's publication, the court must inevitably come to the conclusion that the plaintiff in error's publication continually and consistently committed at least the

third offense denounced by the espionage law, and that it thereby became nonmailable under the law.

The record in this case establishes the fact of the continuous violation of the Espionage Act from day to day by this publication. It is immaterial whether or not each of its issues were examined, declared unmailable and prevented from passing through the mails. The matter carried by the various issues is now before the court with the ruling of the Postmaster General thereon in annuling the second class mailing privilege of the publication in question. It is manifest that as a matter of fact it was impossible for the postal establishment without vast additions to its force to locate and withdraw from the mails all of the millions of pieces of nonmailable matter placed therein during this war. The Court of Appeals in this case (Record, p. 52) said:

> We shall not review the articles from appellant's publication set forth in the answer, for when they are taken as a whole and considered in connection with the circumstances under which they were printed, we think the conclusion reached by the Postmaster General as to their purpose and effect was warranted. No one can read them without becoming convinced that they were printed in a spirit of hostility to our own Government and in a spirit of sympathy for the Central Powers; that, through them, appellant sought to hinder and embarrass the Government in the prosecution of the war.
>
> There would be no question, in our view, as to the authority of the Postmaster General to

> refuse the privilege of the mail to many, if not all, of the issues of appellant's publication between the dates mentioned, because they fall within the inhibition of the statute. (Id., p. 52.)

JURISDICTION OF POSTMASTER GENERAL.

The Court of Appeals of the District of Columbia, as stated, sustained the view of the Postmaster General with respect to the nonmailable character of the matter habitually carried by the Milwaukee Leader and declined to issue the writ of mandamus. However, in closing its opinion it made use of the following language (Rec., p. 52.):

> A more difficult question is presented, however, when we come to consider the right of the Postmaster General to make a blanket order refusing the second class mail privilege to that publication in the future, which in practical effect is a refusal of mail privileges. The statute contains no express grant of such authority. This is significant, in view of the fact that Congress deemed it necessary to grant such authority in respect to "any fraudulent lottery, gift enterprise, or scheme for the distribution of money," etc. (Section 3929, R. S.)

This expression has caused attorneys appearing here in the interest of the plaintiff in error to concentrate their attacks upon the power of the Postmaster General to revoke the second class mailing privilege of a publication on account of a violation of the Espionage Act.

The Court seems to have been under a misapprehension with respect to the source of authority

claimed by the Postmaster General for revoking second-class mailing privileges. The authority for the Postmaster General's action in this respect is the Classification Act, not the Espionage Act. The latter act simply fixed the status of certain matter which under the terms of the Classification Act was not entitled to the second-class privilege. (See Record, p. 5.) Furthermore, the Court was in error as to there being a distinction, in the respect suggested, between the fraud and lottery statute and the espionage law.

In case of the withdrawal of the second-class mailing privilege the Postmaster General does not make a blanket order refusing the second-class mailing privilege "in the future, which in practical effect is a refusal of the mail privilege," for the reason that if at any time after the revocation of a second-class mailing privilege permit the character of the publication is changed and left free of nonmailable matter and the publisher submits a new application to the Post Office Department through the local postmaster accompanied by copies of such new issues, which issues themselves evidence the fact that they are entitled under the law to be carried at the second-class rate of postage, a new permit must be issued. Such action on the part of the Post Office Department is, under the law, mandatory and enforceable through mandamus proceedings. In addition to this, the publisher loses nothing through the time consumed in his presentation and the consideration by the department of such

new application, for section 422 of the Postal Laws and Regulations, 1913, makes the following provision:

> SEC. 422. When an application has been made as provided in section 421, for entry of a publication as second-class matter, the postmaster shall issue to the publisher, on Form 3503, a permit conditionally accepting the publication, pending its classification, for mailing in the manner in which second-class matter is mailed (see sec. 465), and require a deposit of money sufficient to cover postage at the third-class rate—1 cent for each 2 ounces or fraction thereof—computed on each separately addressed copy or package of unaddressed copies offered for mailing pending consideration of the application. Such deposit shall not be taken up in either the postal account rendered to the auditor or the quarterly statement of pound-rate postage rendered to the Third Assistant Postmaster General, but shall be held in trust until the postmaster is advised as to its disposition. If the publication is admitted as second-class matter, the excess of the deposits over the second-class rates of postage shall be refunded. * * *

This aspect of the case was not discussed at the hearing and the Court of Appeals of the District of Columbia was manifestly not advised of this provision of the postal regulations. But anticipating the hardship that might be worked upon a publication which had once lost its second-class mailing privilege without the recognition of a right, by the postal establishment, to have the privilege reestablished upon

proper showing, the court closes its opinion in the following words:

> Should it [Milwaukee Leader] present for transportation in the mails "mailable matter of the second class" (Section 3877, R. S.), and the department should refuse to receive it, a different case would be presented. There is no showing here of such offer and refusal. (Rec., p. 53.)

The Court of Appeals was manifestly laboring under a misapprehension as to the postal laws and regulations with respect to the matter, for in no sense can the refusal to grant a permit or continue the second-class mailing privilege be "in practical effect a refusal of the mailing privileges" for the future.

THE CLASSIFICATION LAW.

The use of the mails is limited to certain classes of matter. These classes by section 3875 R. S., Act of March 3, 1879, c. 180, 20 St., 358, section 7, are as follows:

> First. Written matter.
> Second. Periodical publications.
> Third. Miscellaneous printed matter.
> Fourth. Merchandise.
>
> SEC. 10. That *mailable* matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the enclosed matter is subject: *Provided*, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: *Provided, however*, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

> To the Third Assistant Postmaster General are assigned * * * the classification of mail matter. (P. L. & R. Ed., 1913, sec. 13, p. 26; *vide* generally P. L. & R., 1913, title "Second-class matter.")

All second-class matter must be mailable.

In order to come within the statutory privilege of enjoying classification as second-class matter, or in fact as any class of mail matter, the matter offered must in fact be mailable under some law. Unless it enjoys this status it is not assignable to any class of mail matter, for the law of classification by its own express terms can operate only upon *mailable* matter. The several classes of mailable matter are distinguishable from each other by their various characteristics, but matter of the first, third, and fourth classes is markedly distinguished from second-class matter, in that second-class matter covers not individual items of mail in existence, but matter conforming to certain requirements fixed in advance of the actual production of the matter, and the individual issues must continuously conform to the conditions fixed for that class. As a consequence a permit granting the second-class privilege must of necessity be based upon sample issues of the publication made up so as to meet the requirements of the statute, although the permit granting the second-class privilege must of necessity act *in futuro*. For that reason the Postmaster General is given authority by law to revoke second-class mail permits when he finds that the conditions which are *sine qua non* have ceased to be complied with.

In the very nature of things in the revocation of a permit the Postmaster General could in no case determine what a publication would do with respect to compliance with the law authorizing its permit except from samples of issues which had already been published. So when in the instant case the Milwaukee Leader, as established by the record from day to day, offered, under the generous terms of the second-class permit, nonmailable matter, the blanket right of that paper to the second-class privilege necessarily came into question, for if the individual issues of the paper are indubitably nonmailable, such nonmailability can not be divorced from them when considering them in the aggregate. Reversing the process, if a publication at the time of its application for a permit presented so many nonmailable numbers to the department with an application for the second-class privilege the permit could not be granted, as the matter would not comply with the very first essential to such classification—that is, that it must be mailable. Nor does it help the case of the plaintiff in error that it once enjoyed the privilege, for the law expressly reserves to the Postmaster General the right to revoke the privilege when the circumstances warrant such revocation.

There must be continuity of lawful issues.

So many of the individual issues of the plaintiff in error's publication having been found unmailable its status as a continuous publication became affected. For how can issues manifestly in violation of law be

set up as sufficient to preserve that continuity of issue required by the law to bring the case within the terms of the Classification Act requiring continuity of issue. (First condition, sec. 14, act of March 3, 1879, quoted above.) This has been the view of the Post Office Department from the passage of the Classification Act and the continuity of issue of a publication has been uniformly held to have been broken where issues in violation of law have been published. And this even though individual issues here and there might, if considered alone, be determined to be mailable if the matter carried was disassociated from the clearly nonmailable matter in other issues. In this connection attention is invited to the decision of the District Court for the Southern District of New York in the Masses case, see appendix hereto, in which the Court said:

> The hearing which the law requires to be given before a second-class privilege can be revoked would indicate that the past conduct of the magazine may be taken into account. Clearly the Masses in several of its recent issues violated the Espionage Act and upon this ground might properly be deprived of its privilege. The position of the Postmaster General that the privilege might be revoked because a magazine which published unlawful matter in some of its issues was not regularly issued within the meaning of the statute seems not unreasonable. That which must be regularly issued is a lawful magazine. If the publication contains matter in violation of law,

> it ceases to be a mailable publication at all, and hence can lay no claim to regularity of issue.

(See also *Jeffersonian Pub. Co.* v. *West*, 245 Fed. 585.)

The eligibility of a publication for the second-class permit must necessarily rest upon the matter carried in successive issues submitted to the Post Office Department for examination in connection with the application for the permit. When a publication is issued it must necessarily be upon the assumption, based upon past performance, the correctness of which the future can alone demonstrate, that the issues of the publication will continue to comply with the fundamental requirements of the law; so likewise once a permit is revoked it must necessarily be upon the assumption that the continued policy of the publication which has rendered its issues nonmailable will be continued until the publishers have disclaimed such intention and submit new issues which show that it has again become entitled by law to a reissue of the second-class permit.

The plaintiff in error received no vested right to have its publication received in the second-class mail by reason of the permit granted it. The permit itself contained the proviso that it should be "revocable upon determination by the department that the publication does not conform to law," and it is contended here that that determination has been made as provided by law.

It is clear that Congress, in the section of the espionage law relating to the mails, dealt with the administration of the post office as such and not with the question of crime created by other sections of the law. It did not there provide judicial procedure for the punishment of the crime but left it to fall within the general jurisdiction of the appropriate courts. It likewise left the mailing provisions to be enforced under the general jurisdiction of the Postmaster General theretofore established by law. The plaintiff in error was not entitled to a hearing in a court of the United States on the administrative question whether its paper had ceased to be mailable. The authority of the Postmaster General to settle such questions has been upheld in—

Horner v. *United States*, 143 U. S. 207.
Horner v. *United States*, 143 U. S. 570.
Public Clearing House v. *Coyne*, 194 U. S. 497.

In the last-mentioned case the court said, p. 509:

> As was said by Judge Cooley, in *Weimer* v. *Bunbury*, 30 Mich. 201, "There is nothing in these words ('due process of law'), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the Government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has

> never been supposed that the common law would afford redress." If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the Government.

And Id., p. 508:

> It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106.

The Milwaukee Leader was not being "published for the dissemination of information of a public character."

There is no claim here, nor could such a claim be established, that the Milwaukee Leader is devoted to literature, the sciences, arts or some special industry, such as are set out in the law; consequently in order to comply with the fourth condition of section 14 of the act of March 3, 1879 (20 Stat. 359), the paper

"must be originated and published for the dissemination of information of a public character."

As we have attempted to show elsewhere in this brief, discretion has been lawfully vested by Congress in the Postmaster General to do two things of vital import in this case. The first is to determine when publications comply, or cease to comply, with conditions authorizing the enjoyment of the second-class privilege; and, second, the determination of nonmailability of matter because violative of the Espionage Act.

The question then naturally presents itself: Did not the publication, in its daily misrepresentations as to the cause of the war as stated by the President and Congress and by its repeated efforts through the printed word to interfere with the conduct of the war in a manner prohibited by Congress, cease to be "published for the dissemination of information of a public character" within the meaning of the act, and place itself in the reverse of that position by becoming an agent for the dissemination of the seeds of disloyalty, insubordination, mutiny, etc., which Congress by solemn enactment had declared to be against the public policy of this Nation, indeed had in positive and specific terms declared such matter to be nonmailable and prohibited its carriage or delivery by the postal agencies of the Government, as well as stamped its dissemination as a crime indictable and punishable as a serious offense against the Nation itself?

Permitting the transportation through the mails of matter at the second-class rate—that is, at about

one-seventh of the actual cost of its handling to the postal service—is not, in theory, for the benefit of the publishers of the newspapers, though they do profit thereby, but it is a public charge upon the revenue of the Government to the end that the general public may receive as inexpensively as possible information of public benefit. The object of the Espionage Act, on the other hand, was to prevent public utterances and the dissemination of matter defined by the law as inimical to the public welfare. Thus, the Postmaster General and this court are confronted with the intent and purpose of the Congress in passing these two measures, i. e., the mail classification and the Espionage Acts. An examination of the two acts together, in the light of the facts in this case, would seem clearly to establish the proposition that when the plaintiff in error for a long period of time continuously published matter indubitably in violation of the Espionage Act, it therein and thereby ran counter to the expressed purpose and requirement of the Congress contained in the Classification Act that publications, in order to be entitled to be entered in the second class, must be published "for the purpose of disseminating information of a public character." To hold that the relator was meeting this requirement of the Classification Act while at the very same time its issues from day to day were violating the Espionage Act in the manner stated would be to impute to Congress inconsistent and irreconcilable purposes totally untenable.

The power of the Postmaster General to issue and revoke the second-class mailing privilege.

The Federal statutes recognize the existence of the power in the Postmaster General to issue and revoke the second-class mailing privilege. The act of March 3, 1901, 31 Stat., c. 851, 1107, provides that:

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

It may be said in this connection that the power to revoke second-class mailing privileges had been exercised from the date of the Classification Act to the passage of the above-quoted act under the broad principle of law that the power to grant a license carries with it the power to revoke in cases where the conditions of the license had been violated or where it had been issued through mistake.

POWER OF COURTS TO REVIEW.

In the foregoing pages we have assumed a burden greater than necessary in establishing that the publications in the Leader did violate the law. We have done this because of the slurs on the *bona fides* of the Postmaster General's conclusions by the plaintiff in error and so that the court can see that they are unfounded. Under such circumstances, the court may think it proper to rest its decision on the merits of said publications rather than on the presumption in favor of the correctness of the Postmaster General's conclusions, if it finds that said conclusions were

correct. It is well, at this point, however, to consider the power of the court to review and in reviewing the facts on which the action of the Postmaster General was based.

On these points no original argument of counsel is necessary. The Supreme Court of the United States in a number of cases has so clearly stated when, and the extent to which such actions will be reviewed, that the question can be submitted on that authority.

First, the court is not called upon to decide the correctness, in its view, of the decision, whether of law or fact, of the executive officer, unless there was no evidence, no fact or circumstances, before him upon which by any process of honest reasoning the decision could be justified, or unless it is clear that the action was based upon a clearly wrong interpretation of the law. In either of these cases the court might consider the action of the officer as arbitrary or the result of whim or caprice, not as an execution of a law, but rather as a maladministration of it.

The principle is stated in *Bates* v. *Payne*, 194 U. S. 106, 109:

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness,

and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

And it was also said:

> In the early case of *Decatur* v. *Paulding*, 14 Pet. 497, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324: "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." (P. 109.)

Referring directly to the power of the Postmaster General to determine the classification of mail matter, the court in the same case said:

> But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail

> matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. (P. 107.)

In *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, referring to the duty of the Secretary of the Interior to execute the laws which regulate the purchase, selling, and care and disposition of the public lands, the court said (p. 324):

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ was granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the

> judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts.

In *Lane* v. *Mickadiet*, 241 U.S. 201, which involved a determination of facts by the Secretary of the Interior to entitle claimant to certain lands, the court said, p. 209:

> But it is said that the purpose of the statute was to give the recognized heir a status which would entitle him to enjoy the allotted land and not to leave all his rights of enjoyment open to changing decisions which might be made during the long period of the trust term and thus virtually destroy the right of property in favor of the heir which it was the obvious purpose of the statute to protect. But in last analysis this is a mere argument seeking to destroy a lawful power by the suggestion of a possible abuse. We say this because although it be conceded for the sake of the argument only that an exercise of power which was plainly an abuse of discretion depriving of the right which the statute plainly gave would be subject to correction by the courts, such concession would be here

without influence since there is no basis whatever upon which to rest an assumption of abuse of discretion.

So far as the Nebraska decree is concerned, the mistake upon which the proposition proceeds is obvious since, canceling the premise upon which it must rest to be well founded, it affords no ground for preventing by judicial action the exercise by the Secretary of his power to determine the legal heirs and in doing so to ascertain the existence of the Nebraska judgment, the jurisdictional outcome material of the court by which it was rendered and the legal effect which it was entitled to receive under the law of Nebraska.

* * * * *

It follows from what we have said that the court below was without jurisdiction to control the conduct of the Secretary concerning a matter within the administrative authority of that officer * * *

We submit that these authorities clearly show that mandamus will not lie to control or review the action of an executive officer which involves the lawful exercise of his judgment in determining the existence of the facts which form the basis for his action, except for the purpose of ascertaining if there has been a lack or abuse of that discretion which the law commands. So, in this case, there can be no review of the finding of facts by the Postmaster General, for, though the court may possibly draw a conclusion from the publications of the Leader not up in the answer different from that heretofore set

forth and different from that of the Postmaster General, it can not say that these conclusions are so unfounded and far fetched as to constitute an abuse of discretion.

Indeed, although at great pains to maintain the right of the court to review the facts, the plaintiff in error's brief does not seem to attempt to show that the articles in the Leader were not susceptible of the construction placed on them by the Postmaster General, nor does it suggest any other meaning of them, unless it be inferred from the general language used which appears to be rather a criticism of Congress for having by the Espionage Law created an offense in some manner vaguely within the twilight field whereby the right of honest criticism was destroyed and a supposed likeness of the Leader's publications to words of Lincoln, Webster, Clay, Sumner, Theodore Parker, Corwin, and Lloyd George in time of war, quoted, which are offered to "show that only the cowardly lack of true conception as to not only the right of free speech, but the duty of exercising that right, has been challenged in times of supreme crisis by these great outstanding figures."

The Hearing.

By act of Congress approved March 3, 1901 (31 Stat., p. 1107), it was provided that—

> when any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

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>
> * * * * *
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forth and different from that of the Postmaster General, it can not say that these conclusions are so unfounded and far fetched as to constitute an abuse of discretion.

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The Hearing.

By act of Congress approved March 3, 1901 (31 Stat., p. 1107), it was provided that—

> when any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

Point is made that no "hearing" was had under this law. The record shows that the plaintiff in error was notified on September 11, 1917, that a hearing would be granted on September 22 to show cause why the authorization of admission of the Milwaukee Leader to the second-class mail matter should not be revoked on the ground that it was not a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations, which contains the espionage law; that Victor L. Berger, the editor of said paper, appeared at the hearing accompanied by his attorney who was attorney for the plaintiff in error; that the hearing was before the Third Assistant Postmaster General, upon whom, in the due administration of departmental business, the duty of conducting the hearing devolved; that said hearing was conducted in accordance with established departmental practice after due notice to the plaintiff in error, who was afforded full opportunity to offer evidence and argument, of which it availed itself; that in accordance with departmental practice and also at the special instance and request of said Berger the Postmaster General affirmed and approved the finding of the third assistant. The answer denies that any inquiry was made at said hearing as to the specific article or offense charged.

The plaintiff in error's brief refers to the hearing as a "grotesque substitute" for due process of law (p. 15), but while replete with criticism of the procedure, it

fails to point out any particular in which the hearing lacked legality.

In *Smith* v. *Hitchcock* and *Tousey* v. *Hitchcock* 226 U. S. 53, criticism of a similar hearing met with this answer by the court:

> The decision that these weeklies are books shortens what needs to be said as to the sufficiency of the hearing. The parties were notified that they would be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at a fixed day and hour, to show cause why the admission to the second class should not be revoked and the third-class rate of postage charged, on the ground that the issues were not periodical publications but were books. They sent a representative to Washington who left a printed response in advance, asking for further opportunity for argument if the authorities were not satisfied, and who called at the appointed time. He was referred to the Chief of the Classification Division, the proper person. Rev. Stat., sec. 161, Postal Laws and Regulations. Ed. 1902, sections 6, 19, subsection 1, 8. He saw him and asked if the brief had been received, was answered yes, and then asked if the other had any questions to ask and was answered no. He presented a pamphlet "The Influence of the Dime Novel" and departed, offering no further argument, seemingly somewhat aggrieved at not having seen the Third Assistant Postmaster General in person. Subsequently, the Assistant Attorney General for the Post Office Department was consulted by the

> officials; in accordance with his opinion the order was issued which the plaintiffs seek to restrain.
>
> The matter was argued to us with some feeling, and it is not impossible that the interview gave an impression of official indifference, but the plaintiffs allege in their bills that the question was a pure question of law; it was a question that they had a right to have reviewed and have had reviewed in this court; it was clearly defined; the official was not called on to state reasons or to discuss—his only duty was to hear and beyond offering the printed brief the plaintiffs' representative showed no desire to be heard. This is not a case in which even by manner or indirection the plaintiffs were prevented from offering material evidence. The facts and the question were as plain then as now. The conclusion reached was right, and in the circumstances disclosed, we are of opinion that the plaintiffs had no cause to complain (p. 60).

What did the Third Assistant Postmaster General refuse to hear in the present case? What evidence or statement of relator was refused a hearing?

PLEADING OVER.

The third assignment of error is: The court erred in affirming the action of the Supreme Court of the District of Columbia in refusing to the relator the right to plead over when the court overruled the demurrer of said petitioner. (Rec., p. 57.)

Plaintiff in error's brief makes no mention of this assignment and whether it will be abandoned or in-

sisted upon in argument we are not advised. The situation was unusual. The relator first filed eight pleas to respondent's answer (Rec., p. 46). Demurrer to the pleas was sustained on the ground that they amounted to no more than a demurrer to the return (p. 47); whereupon the relator declined to further plead and asked and received leave to demur to the answer (Rec., p. 48). On the hearing of this demurrer the decree sustaining the demurrer and dismissing the petition was entered with an exception to relator to the action of the court in denying leave to plead over (Rec., p. 48).

It will be observed that the usual order of pleading was reversed and while relator may have been entitled to plead over if it had demurred in the first instance, yet it had received permission to demur on the faith of its statement that it declined to plead further.

Having thus informed the court that it had no fact to plead, and diligent counsel now suggests no possible plea, it was not error for the court to hold the plaintiff in error to its statement. No possible injury thereby is suggested.

CONCLUSION.

It is respectfully submitted that there is no error in the judgment and it should be affirmed.

WILLIAM H. LAMAR,
Solicitor for the Post Office Department.
WILLIAM L. FRIERSON,
Solicitor General.

JANUARY, 1921.

APPENDIX.

THE MASSES CASE.

OPINION OF UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, RELATING TO REVOCATION OF SECOND-CLASS MAILING PRIVILEGE UNDER ESPIONAGE ACT (ACT OF JUNE 15, 1917).

United States District Court, Southern District of New York. Masses Publishing Co., complainant, v. *T. G. Patten, postmaster of the city of New York, defendant.*

AUGUSTUS N. HAND, *District Judge:*

This suit is brought to enjoin the postmaster of New York from treating the September issue of the Masses as a nonmailable publication and to require him to transmit it through the mails. A motion is made for an order *pendente lite* for substantially the same relief as prayed for by final decree.

The Postmaster General after a hearing revoked the privilege of the Masses to be transmitted as second-class mail matter in a communication addressed to the Postmaster of New York under date of August 15, 1917—

> Because it appears from the evidence in possession of the department that the publication is not a "newspaper or other periodical publication" within the meaning of the law governing mailable matter of the second class, and, furthermore, is not regularly issued at stated intervals as a newspaper or other periodical publication within the meaning of the law, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations.

Section 481½ of the Postal Laws and Regulations in substance prohibits the use of the mails to publications which violate the Espionage Act of June 15, 1917. Both the affidavit upon which the order to show cause was granted and the answering affidavit indicate that the September issue of the Masses has not been declared in itself nonmailable and that the question whether it is mailable or not has not come up for decision. The revocation of the second-class privilege appears to have been due to the fact that recent issues of the magazine contained nonmailable matter in violation of the Espionage Act. No attempt has been made to secure the transmission of the magazine under any other classification than that of second-class mail matter, nor has the necessary postage been paid under any other classification. The replying affidavit sets forth that the department has excluded the September issue from the mails under every classification, but I can not see that this is established by any decision rendered by the postal authorities.

It is unnecessary to decide whether the September issue standing by itself is a nonmailable publication. This would be determined largely by the result of the pending appeal from the order of Judge Learned Hand in the suit involving the August issue. In September the editor adopted a somewhat milder and less pronounced tone than in August, but continued to hold up violators of the conscription act to admiration and to say what he thought he safely could to promote opposition to the war and to undermine the successful conduct of it. Whether enough appears to constitute incitement to violation of law within the meaning of the Espionage Act may be a matter for future decision. The determination

of this question should not in my opinion depend upon the form of the appeal to the public but upon the natural and intended effect of what is said and done. A persistent propaganda by means of articles glorifying the deeds of notorious violators of the conscription act may promote disloyalty in the military forces and cause obstruction to recruiting as truly and designedly as words of formally direct incitement to violation of law. We are dealing with realities and not mere forms of expression, and our system of jurisprudence is neither so artificial nor impotent that the objects of the Espionage Act can be defeated by indirect methods. It is always to be remembered that the "Masses" is not attacking a mere party program or executive policy but is seeking to undermine those means which the Nation had adopted to protect the people of the United States as well as civilization itself from the assaults of a powerful foe after a declaration of war has been made by an overwhelming majority of both Houses of Congress. United effort in this war is plainly of the highest consequence, and the promotion of that united effort and inhibition of disintegrating forces were prime reasons for the passage of the Espionage Act. Whether the August and September issues present such a body or kind of material as to furnish the equivalent of direct incitement to violation of the law need not be decided now, but the ultimate construction of the Espionage Act as applied to publications such as the August and September issues will depend largely upon the importance which the appellate court attaches to the value of unrestrained freedom of speech under all circumstances.

The Government insists that it has done nothing further than to revoke the second-class mail privilege

in a lawful manner after affording the hearing provided for by the act of Congress. In making this decision the department took into consideration the contents of the June, July, and August issues of the magazine.

In the June issue Max Eastman said:

> We wish to persuade those who love liberty and democracy enough to give their energy or their lives for it to withhold the gift from this war and save it to use in the sad renewal of the real struggle for liberty that will come after it. We want them to resist the war fever and the patriotic delirium, the sentimental vanity, the sentimental hatred, the solemn hypocrasies of idealists, resist the ceremonious installations of petty tyrants in every department of our lives, resist conscription if they have the courage, and at whatever cost to their social complaisance save themselves for a struggle of human liberty against oppression that will be what it says it is.

The same author says at page 24 of the June issue:

> We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world.

In the July issue Bertrand Russel writes at page 5:

> The young men of America will be performing the greatest possible service to those less fortunate contemporaries in Europe by maintaining throughout the remainder of the war the right of the individual to judge for himself whether he will engage in destruction at the bidding of men less wise and humane than himself or whether he will preserve inviolate the claim that a man's own estimate of right and wrong should be the ultimate arbiter of his conduct.

The foregoing excerpts plainly are direct appeals to resist conscription. The August issue of the Masses was filled with glorification of those who refused to enlist and violated the law, and the September issue contained similar matter in diluted form. Judge Learned Hand ordered the transmission of the August number through the mails because he thought it had not gone far enough to be treated as in effect inciting resistance to conscription, while Judge Hough in the Circuit Court of Appeals regarded this decision as so doubtful that he granted a stay of the order pending appeal. Such was the record of the Masses prior to the September issue, when the department revoked its second-class mailing privilege.

A publication to be entitled to second-class mail privilege must be regularly published at stated intervals. The Postmaster General in a report to the Senate says:

> In order for any publication to have the second-class privilege it must, among other things, be issued regularly at stated intervals, and in order to be permitted to the mails under any classification it must be mailable under the law.
>
> All of the publications, including the Masses, which have had the second-class privilege withdrawn on account of violations of the Espionage Act have lost that classification primarily for the reason that they were publishing matter which made their issues nonmailable under any classification, and hence are not newspapers or other periodical publications within the meaning of the law governing second-class mail matter.
>
> For many years this department has held publications not to be "regularly issued" in contemplation of law when any issue has con-

tained nonmailable matter; and when the second-class privilege has been withdrawn, under such circumstances, the formal notice of withdrawal has contained the statement that the second-class privilege has been revoked on both of the grounds stated.

As a matter of fact, in case of the Masses and other publications covered by the Hardwick resolution, following the usual practice of the department, not only have the particular issues which have been declared to be nonmailable but various other issues of the publication have been taken into consideration in determining their right to the second-class privilege, so that the final action was necessarily based principally on other and very much broader grounds than the break in the continuity of the publication.

The hearing which the law requires to be given before a second-class privilege can be revoked would indicate that the past conduct of the magazine may be taken into account. Clearly the Masses in several of its recent issues violated the Espionage Act and upon this ground might properly be deprived of its privilege. The position of the Postmaster General that the privilege might be revoked because a magazine which published unlawful matter in some of its issues was not regularly issued within the meaning of the statute seems not unreasonable. That which must be regularly issued is a lawful magazine. If the publication contains matter in violation of law, it ceases to be a mailable publication at all, and hence can lay no claim to regularity of issue. It was for this reason that the Masses was held by the Department not to be regularly issued and not for the absurd reason suggested at the argument that transmission had been interrupted by the stay of Judge

Hough. A more important ground of revocation than irregularity of publication was the illegality of matter contained in recent issues.

The second-class privilege was properly revoked, and as no attempt has been made to secure transmission under any other classification, the motion is denied.

SEPTEMBER 12, 1917.

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IN THE

Supreme Court of the United States

October Term, 1919

No. [redacted]155

THE UNITED STATES OF AMERICA *ex rel.* MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY,

Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States,

Appellee.

Motion for Leave to File Brief of the Workingmen's Cooperative Publishing Association as *Amicus Curiae* and Brief.

WORKINGMEN'S COOPERATIVE PUBLISHING ASSOCIATION,
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INDEX.

PAGE

Motion for Leave to File Brief as *Amicus Curiae*.. 1

Brief of *Amicus Curiae* 3

POINT I.—The act of the Postmaster General in revoking or annulling the second-class mailing right of the relator's publication was not authorized by law, was contrary to law and deprived the relator of a right which it had not forfeited. The relator is entitled to a writ of mandamus commanding the Postmaster General to vacate, rescind and annul the order made by him denying the use of the mails to The Milwaukee Leader as second-class matter..... 6

CONCLUSION.—The relief sought by the appellant, through the writ of mandamus for which the relator petitions, should be granted.. 40

Cases Cited.

United States of America *ex rel.* Milwaukee Social Democratic Publishing Company v. Albert S. Burleson, Postmaster General of the United States, 47 Washington Law Reporter, 349..... 11

United States of America *ex rel.* Workingmen's Cooperative Publishing Association v. Albert S. Burleson, Postmaster General of the United States, decided in Supreme Court of the District of Columbia, August 25th, 1920..... 12

Duncan Townsite Co. v. Lane, Secretary of the Interior, 245 U. S., 308..... 13

Arant v. Lane, Secretary of the Interior, 249 U. S., 367 16

PAGE

Dancy v. Clark, 24 App. D. C., 487 17
Houghton v. Payne, Postmaster General, 194 U. S., 88 18
Public Clearing House v. Coyne, 194 U. S., 597..... 21
Lewis Publishing Co. v. Morgan, 229 U. S., 288..... 22
Hoover v. McChesney, 81 Fed., 472 22
Brooklyn Daily Eagle v. Voorhies, 181 Fed., 579..... 23
Schaefer v. United States, 251 U. S., 466..... 27
West v. Hitchcock, 19 App. D. C., 333 28
Roberts v. United States, 176 U. S., 221..... 32
Payne v. United States *ex rel.* National Railway Publishing Company, 20 App. D. C., 581..... 34
Payne v. United States *ex rel.* National Railway Publishing Company, 189 U. S., 512 and 192 U. S., 602. 38

Statutes Cited.

Postal Laws: U. S. Compiled Statutes, Sec. 7304, being Act of March 3, 1879, Chapter 180, Sec. 10, 20 Stat., 359 5
Postal Laws: U. S. Compiled Statutes, Sec. 7305, being act of March 3, 1879, Chapter 180, Sec. 12, 20 Stat., 359 5
Postal Laws: U. S. Compiled Statutes, Sec. 7306, being Act of March 3, 1879, Chapter 180, Sec. 14, 20 Stat., 359 5
Espionage Law (Act of June 15, 1917), Title XII, Section 1 and Section 2..... 8
Espionage Law (Act of June 15, 1917), Title XII, Section 4 25

IN THE

Supreme Court of the United States

October Term, 1919

No. 482

THE UNITED STATES OF AMERICA *ex rel.* MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY,

Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States,

Appellee.

Motion for Leave to File a Brief of the Workingmen's Cooperative Publishing Association as *Amicus Curiae.*

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Workingmen's Cooperative Publishing Association, a membership corporation, incorporated under the laws of the State of New York, and having its office in the City of New York, publisher of The New York Call, a daily newspaper, by S. John Block and Seth Shepard, its attorneys, moves this honorable Court for leave to file a brief as *Amicus Curiae* in the above-entitled cause.

The Workingmen's Cooperative Publishing Association seeks to intervene as *Amicus Curiae* on account of

the important public question involved in this case and on account of the possible effect of the Court's decision of this appeal upon an appeal now pending in the Court of Appeals in the District of Columbia in a similar action commenced by the Workingmen's Cooperative Publishing Association against the said Postmaster General, in which action the Supreme Court of the District of Columbia has granted a petition for a writ of mandamus. The Postmaster General has appealed from the determination made in said action by Mr. Justice WILLIAM HITZ. Said appeal has not yet been argued.

Dated, January 6, 1921.

Respectfully submitted,

THE WORKINGMEN'S COOPERATIVE PUBLISHING ASSOCIATION,

By S. JOHN BLOCK,

SETH SHEPARD,

Attorneys.

IN THE

Supreme Court of the United States

October Term, 1919

No. 482

THE UNITED STATES OF AMERICA *ex rel.* MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY,

Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States,

Appellee.

Brief of Workingmen's Cooperative Publishing Association as *Amicus Curiae.*

This is an appeal from a determination of the Court of Appeals of the District of Columbia, affirming the refusal of the Supreme Court of the District of Columbia to grant to the relator, Milwaukee Social Democratic Publishing Company, publisher of The Milwaukee Leader, a writ of mandamus requiring Albert S. Burleson, Postmaster General of the United States, to restore to the relator's publication its second-class mailing right which the Postmaster General had cancelled or revoked.

The Milwaukee Leader is a daily newspaper, published in the City of Milwaukee, Wisconsin. It was duly admitted to the second class mails and continued for a

number of years to enjoy the benefits of that classification so essential to the existence of a newspaper or other periodical publication, the rate of postage being substantially lower in that classification than in other mail classifications. Because of miscellaneous articles published in various issues of The Milwaukee Leader, which articles, in the opinion of the Postmaster General, violated provisions of the Espionage Law, the Postmaster General cancelled or revoked the second-class mailing right of that newspaper, thus compelling said newspaper to discontinue its mail circulation.

The appellant maintains and it appears to be admitted that it has sustained and will continue to sustain irreparable injury through the alleged unwarranted act of the Postmaster General in revoking its second-class mailing right and that relief can be had only by the writ of mandamus sought in this action. The allegation of such irreparable injury is predicated upon the loss of subscribers, loss of advertising and the increased cost of postage. Similar losses would be sustained by any newspaper or other periodical publication improperly excluded or removed from the second-class mail classification.

The Postmaster General is wholly without legal power to refuse to grant or to cancel or revoke the second-class mailing right of a newspaper or periodical publication which complies with the provisions of the postal statutes pertaining to matter of the second class.

The following statutes embrace the conditions upon which a publication *"shall be admitted to the second class":*

> "Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the

conditions named in sections twelve and fourteen." (United States Compiled Statutes, §7304, being Act of March 3, 1879, chapter 180, §10, 20 Stat., 359.)

"Matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject; Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same." (United States Compiled Statutes, §7305, being the Act of March 3, 1879, chapter 180, §12, 20 Stat., 359.)

"The conditions upon which a publication *shall be* admitted to the second class are as follows: First, It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second, It must be issued from a known office of publication. Third, It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. Fourth, It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." (United States Compiled Statutes, §7306, being Act of March 3, 1879, chapter 180, §14, 20 Stat., 359.)

The Postmaster General seeks to justify his action by declaring that the appellant's newspaper is not, to

quote from his notification addressed to the appellant, "a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class, it being in conflict with the Act of June 15, 1917 (Espionage Law)," although, as will be shown hereafter, the Espionage Law does not confer any power upon the Postmaster General to refuse to grant or to revoke a second-class mailing right because one or more separate issues of a newspaper or other periodical publication may contain matter which, in the opinion of the Postmaster General, transgresses the provisions of the Espionage Law.

It is further respectfully submitted that the action of the Postmaster General is not one involving a mere discretionary power and is subject to judicial review and correction.

POINT I.

The act of the Postmaster General in revoking or annulling the second-class mailing right of the relator's publication was not authorized by law, was contrary to law and deprived the relator of a right which it had not forfeited. The relator is entitled to a writ of mandamus commanding the Postmaster General to vacate, rescind and annul the order made by him denying the use of the mails to The Milwaukee Leader as second-class matter.

The Postmaster General revoked or annulled the second-class mailing right or privilege of The Milwaukee Leader because in his opinion certain issues of said publication published prior to the time of the revocation of the second-class rights contained articles or other mat-

ters which in his opinion violated the provisions of the Espionage Law, and were therefore non-mailable.

The answer of the Postmaster General contains a collection of excerpts from articles and other matter which appeared in The Milwaukee Leader at various times. Upon these articles and probably upon others not included in the answer the Postmaster General arrogated to himself the right to revoke the second-class mailing right of The Milwaukee Leader. This brief will not enter upon an unnecessary discussion of these various articles with reference to their violation or non-violation of the Espionage Law. It is not deemed necessary here and now to justify the publication of these articles. It may for the purpose of argument be assumed, but in no way conceded, that the articles in question did in some way violate the provisions of the Espionage Law. Such violation, however, if any there was, by any article or articles appearing in certain specific issues of The Milwaukee Leader, while they may have warranted the withholding from circulation through the mails of the specific issues containing the alleged objectionable matter, and while they may also have warranted a prosecution of the relator or of alleged liable individuals, for violation of the Espionage Law, did not warrant or justify the Postmaster General in revoking the second-class mailing right of the paper.

It is specific matter which is made non-mailable by the Espionage Law, and not the newspaper or periodical, as a continuing publication, which is made non-mailable. The issues of a newspaper or periodical which contain no matter which violates the Espionage Law are not in conflict with that law and do not become non-mailable either in the second class of mail matter or in any other class because certain other issues of the newspaper or periodical may have contained matter which was in conflict with the Espionage Law.

The Espionage Law (Act of June 15, 1917), title XII, is as follows:

> "§1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing of any kind in violation of any of the provisions of this Act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier: Provided, That nothing in this Act shall be so construed as to authorize any person other than an employe of the Dead Letter Office duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.
>
> "§2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing of any kind containing any matter advocating or urging treason, insurrection or forcible resistance to any law of the United States is hereby declared to be nonmailable."

The other titles of the Espionage Law refer to various acts of interference with the foreign relations, neutrality and the foreign commerce of the United States, acts of espionage, and provide for the punishment of such acts. Nowhere in the Espionage Law is there a provision with reference to the revocation of the mailing rights of a newspaper or publication. The Espionage Law makes no reference to classes of mail matter. It proscribes certain matter as absolutely non-mailable and directs that such matter shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier. If The Milwaukee Leader as a continuing publication became non-mailable through the publication of certain articles in certain specific issues it became non-mailable

in the several classes of the mails. It did not, however, become non-mailable, and neither the Espionage Law nor any other statute provides that it became non-mailable.

Nor is there any warrant in law or in philology for the assertion by the Postmaster General that because certain issues of The Milwaukee Leader contained certain alleged objectionable matter The Milwaukee Leader ceased to be a "newspaper or other periodical" within the meaning either of the Postal Laws or of the Espionage Law. It should be noted that the citation which was served by the Postmaster General upon the relator required the relator to show cause why the authorization of admission of The Milwaukee Leader to the second-class of mail matter should not be revoked upon the ground that "the publication is not a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in §481½, Postal Laws and Regulations." Neither the Postal Laws nor the Espionage Law justifies the assertion that The Milwaukee Leader is not a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class.

From the time when The Milwaukee Leader was admitted to the second-class mails until the second-class mailing right was revoked, a period of several years, The Leader was undoubtedly a newspaper within the meaning of the law governing second-class mail matter. It did not cease to be a newspaper because it contained this or that editorial or this or that article or this or that cartoon. Nor, as has been said, did it cease to be a newspaper entitled to circulate through the second-class mails.

The Milwaukee Leader has always met the following conditions upon which a publication shall be admitted

to the second class of mail matter: (1) It is regularly issued at stated intervals at least four times a year, it being a daily newspaper, and it bears a date of issue and the issues are numbered consecutively. (2) It is issued from a known office of publication. (3) It is formed of printed paper sheets without substantial binding such as distinguishes printed books from periodical publications. (4) It is originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts or some special industry and has a legitimate list of subscribers and it is not designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

The foregoing statement of requirements are those embodied in §7306 of the United States Compiled Statutes hereinbefore quoted in full. It should be noted that the provisions of said section are absolutely mandatory. Upon compliance with the conditions enumerated, a publication "shall be admitted to the second class." The statutes may be searched in vain for any provision of law which gives the Postmaster General a right to revoke the second-class mailing rights of a publication which continues to conform with the requirements of said section. It is only when a publication ceases to conform with any of those requirements that the Postmaster General may after a hearing revoke the second-class rights and place the publication in question in another classification.

To gratify his desire to inflict some kind of punishment upon appellant and its neswpaper because "the tendency of the paper is seditious," to quote the declaration of the Postmaster General, he has arrogated to himself the power to impose upon the relator the severe hardship of its deprivation of its second-class mailing rights, without any express or implied authority in law for such

summary action. Grand juries have been in session continuously since the enactment of the Espionage Law, but it seems that the relator has never been indicted, either for publishing articles alleged to be in violation of the Espionage Law or for any other alleged misconduct. The Department of Justice, vigilant, well equipped and extremely active in wartime prosecutions, evidently found no cause for instituting a prosecution against the relator. The Postmaster General himself took no steps to institute such a prosecution. No private person took any steps to institute such a prosecution. There has been no adjudication of any wrongdoing by the relator in the publication of The Milwaukee Leader, save in the mind of the Postmaster General.

The Court of Appeals of the District of Columbia (47 Washington Law Reporter, 349), in its opinion in this case, said, at page 350:

> "A more difficult question is presented however when we come to consider the right of the Postmaster-general to make a blanket order refusing the second class mail privilege to that publication in the future, which in practical effect is a refusal of mail privileges. The statute contains no express grant of such authority. This is significant, in view of the fact that Congress deemed it necessary to grant such authority in respect to 'any fraudulent lottery, gift enterprise or scheme for the distribution of money,' &c. (§3929, R. S.)."

The Court clearly stated that it did not appear that the Postmaster General had authority to revoke the second-class mailing rights, but because of the finding by the Postmaster General that the publication in question had published a number of articles "with intent to interfere with the operation or success of the military or naval forces of the United States," the Court would

not grant the remedial process of a mandamus. The Court did, however, conclude its opinion with the following words:

> "Should it" (the relator) "present for transportation in the mails 'mailable matter of the second class' (§3877, R. S.), and the Department should refuse to receive it, a different case would be presented. There is no showing here of such offer and refusal."

It is difficult to reconcile the decision of the Court of Appeals with the foregoing quotations from its opinion. The decision was erroneous. The Postmaster General had no power to make a finding that the publication in question had published a number of articles "with intent to interfere with the operation or success of the military or naval forces of the United States." Such a finding could be made only by a trial jury in a properly instituted prosecution, after indictment, against the appellant or other defendant for alleged specific violation of the Espionage Law.

In the case of *The United States of America, ex rel. Workingmen's Cooperative Publishing Association* v. *Albert S. Burleson, Postmaster General of the United States,* for a writ of mandamus to compel the restoration of the second-class mailing right to The New York Call, Mr. Justice Hitz of the Supreme Court of the District of Columbia, granted the application for a mandamus and said in the opinion rendered by him on August 25, 1920 (probably reported in a recent volume of the Washington Law Reporter):

> "Whatever application, if any, the Espionage Act may properly have at the present time, and in the present posture of the war with the Imperial German Government which gave it birth, its operation certainly cannot now be enlarged by

> implication. That act, as amended by the act of May 16, 1918, contains no express grant of authority to the Postmaster General to exercise whatever power the act gives him by a blanket order operating in future upon issues of a periodical publication not yet in existence, and consequently not yet subject to the examination of the Department. The Post Office Department apparently asserts the possession of an implied power under this statute to make such a blanket order denying second-class mail privileges for the future to a periodical publication because of alleged past violations of the statute in past issues of the periodical. The Court can find no such authority in the statute. Fraud or wrong doing is never to be presumed."

The foregoing applies to the present case as strongly as it applies to the case just cited.

In *Duncan Townsite Co.* v. *Lane, Secretary of the Interior*, 245 U. S., 308, the Court said at page 311:

> "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles."

The Duncan Townsite case was cited in the opinion of the District of Columbia Court of Appeals in this case, and while the Court cited the Duncan Townsite case as an authority in support of its refusal to exercise its discretion in favor of granting the mandamus, the principle expressed in the matter just quoted requires its favorable application in the present case. In the present case

mandamus is sought not only in the exercise of a sound judicial discretion, but also as a matter of right. It cannot be gainsaid that a great wrong has been committed by the Postmaster General in revoking the second-class mailing rights of The Milwaukee Leader. That wrong can be remedied only by the writ of mandamus which is sought in this action. Surely it cannot be said that the granting of this writ would promote a wrong. The Milwaukee Leader is admittedly a newspaper of general circulation. It may circulate through the more expensive classifications of first and third-class mails at the present time. To permit it to circulate also through the second-class mails, as is its clear right under the provisions of the Postal Laws above quoted, would promote the proper administration of the law, would encourage respect for the law and would discourage unwarranted super-legal acts of public officials. The granting of the writ would not work a public or private mischief and would be within both the letter and the spirit of the law. Indeed a refusal to grant the writ would be tantamount to an approval of the Postmaster General's violation of the Postal Laws pertaining to second-class matter, which expressly state that a publication shall be admitted to the second-class mails upon compliance with the conditions above enumerated. And so long as that publication conforms with such conditions or requirements it has an absolute legal right to the benefits of the second-class classification.

The cases of *Duncan Townsite Co.* v. *Lane*, 245 U. S., 308, and *Arant* v. *Lane*, 249 U. S., 367, cited in the opinion of the District of Columbia Court of Appeals in the Milwaukee Leader case as authorities for the proposition that mandamus, a remedial process, is awarded not as a matter of right but in the exercise of sound judicial discretion and upon equitable principles, did not involve an

absolute right independently and clearly conferred by statute, such as the right of a publication to circulate through the second-class mails upon compliance with the requirements of mail matter for that classification.

The Duncan Townsite Company case was a petition for a writ of mandamus to compel the Secretary of the Interior to restore the name of Nicholas Alberson, deceased, to the rolls under the Choctaw-Chickasaw agreement of July 1, 1902 (32 Stat., 641) and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission. Under that Act, only the names of persons alive September 25, 1902, were entitled to entry on the rolls. Alberson had died before that date. The entry of his name and the issue of the certificate were procured by fraud and perjury. The Court said at page 310:

> "But enrolment and certificates may be canceled by the Secretary of the Interior for fraud or mistake because although the equitable title had passed the land remained subject to the supervisory power of the Land Department until issue of the patent, unless under the statute the power expires earlier by lapse of time. * * * (p. 311). The title conferred by the allotment is equitable only, so that supervisory power remained in the Secretary of the Interior. We are not required to decide whether the power to remove Alberson's name from the rolls had, because of §2 of the Act of April 26, 1906, expired before the Secretary acted. For the Supreme Court of the District did not order the name restored, and its judgment was acquiesced in by the relator. The claim which the relator makes in this court rests wholly upon the fact that the relator was a bona fide purchaser for value. But the doctrine of bona fide purchaser for value applies only to purchasers of the legal estate. It 'is in no respect a rule of property, but a rule of inaction.' Pomeroy, Equity Jurispru-

> dence, §743. • • • (p. 312). The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity, to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose."

It will readily be seen that the exercise of a sound judicial discretion warranted the denial of the writ of mandamus in the Duncan Townsite Company case. There was not present in that case an absolute right, which the relator asserts in the present case, based upon unequivocal statutory mandate.

In the case of *Arant* v. *Lane, Secretary of the Interior*, 249 U. S., 367, the relator was removed from office and was forcibly ejected from a government office building. He waited twenty months before applying for a mandamus against his superior, the Secretary of the Interior, to compel reinstatement. The Court, in the absence of a satisfactory explanation by the relator, held that the delay amounted to *laches*, it appearing that another appointee had meantime been filling the office, performing its duties and drawing the salary. Here also was a situation in no way analogous to that which is presented to the Court in the present case, and quite properly the Court refused to exercise its discretion in favor of the writ. The Court said at page 371:

> "This court has lately said that while mandamus is classed as a legal remedy it is a remedial process which is awarded not as a matter of right but in the exercise of sound judicial discretion and upon equitable principles. *Duncan Townsite Co.* v. *Lane*, 245 U. S., 308. It is an extraordinary remedy which will not be allowed in cases of doubtful right. *Life & Fire Ins. Co.* v. *Wilson*, 8 Pet., 291, 302. And it is generally regarded as not embraced within statutes of limitation applicable

> to ordinary actions, but as subject to the equitable doctrine of *laches*. * * * (p. 372). When a public official is unlawfully removed from office, whether from disregard to the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service. * * * We agree with the Court of Appeals that it is entirely unnecessary to consider whether the removal of the relator from office was technically justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed."

The relator in the *Arant* case just cited presented no facts to the Court showing an absolute right to the relief sought. In the present case the relief sought is a matter of absolute right, not affecting any government department or any employees in any government department, but affecting only the rights and property of the relator and its newspaper.

The legal principles which apply to the granting of a writ of mandamus were well stated in the case of *Dancy* v. *Clark*, 24 App. D. C., 487, the Court saying at page 499:

> "But in the consideration of this matter it must be remembered that while the writ of mandamus may now be regarded as having become a writ of right, there is yet a sound judicial discretion reposed in the courts, even though the petitioner for it may be technically entitled to it, to refuse to grant it when its issuance would not promote the substantial ends of justice, or when it would prove unavailing, or when it would be without beneficial results to the relator or petitioner."

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It follows that when the petitioner is technically entitled to the writ and when its issuance would promote the substantial ends of justice and would result beneficially to the relator or petitioner, the writ must be granted.

The Postmaster General in his answer alleges that the second-class privilege was granted to the relator in December, 1911, and that the authority given was revocable upon determination by the department that the publication does not conform to the law; but the Postmaster General does not allege in his answer that the relator's publication ceased to conform with any of the provisions of the Postal Laws relating to second-class mail matter. It is only when a publication ceases to conform with any of those provisions that it must forfeit its right to the second-class privilege, and the Postmaster General has unquestionable authority to serve notice upon a publisher that his publication having ceased to conform with all of the requirements pertaining to second-class matter must be removed from that classification. It has occurred that a publication having been admitted to the second-class mails was removed from that classification because it was either erroneously placed in that classification or because it ceased to conform with the requirements entitling it to that classification. Such a situation existed in the case of *Houghton* v. *Payne*, 194 U. S., 88, which was a bill in equity filed by the firm of Houghton, Mifflin & Company against the Postmaster General praying that a certain publication known as the Riverside Literature Series be entered and transmitted through the mails as second-class mail matter and for an injunction to restrain the cancellation of a certain certificate of entry previously issued allowing such transmission. It was shown that although a second-class mail permit had been issued for the publication in question, since it complied with the external characteristics and conditions of second-class

mail matter, nevertheless internally and in substance the series of periodicals did not have the characteristics of second-class matter, but had the peculiarities of books and were in fact books. The act of a former Postmaster General in classifying the Riverside Literature Series as second-class mail matter was overruled and the publication was removed from that classification.

The Postmaster General may argue that The Milwaukee Leader does not conform to the law because certain of its separate issues contained editorials or other matter which in his opinion violated the Espionage Law. A newspaper is a continuing publication. Its contents change from day to day. It may on one or several occasions publish articles which may be justly criticized and which may fall within the inhibition of statutes relating to non-mailable matter; but that fact does not and cannot justify the arbitrary revocation of second-class mailing rights for all subsequent issues of the publication, regardless of the mailability or non-mailability of any particular issues. The Postmaster General does not cite and cannot cite any legal authority which confers upon him such a drastic power.

As was correctly said by the Court of Appeals of the District of Columbia in the present case, the refusal of the second-class mail privilege is in practical effect a refusal of mail privileges. The rates of postage for second-class mail matter under the statutes are substantially lower than those for matter in other classifications. Congress established the second-class classification for the purpose of enabling newspapers and periodicals to extend their circulation beyond the confines of the town or cities in which they were published. Without that second-class mailing right, a newspaper must confine its circulation practically to the town or city in which it is published. It is alleged that its mail circulation has been

completely destroyed by the Postmaster General's revocation of its second-class right. It is alleged that its advertising income has suffered as a result of such revocation. It is a matter of common knowledge that practically all newspapers have substantial mail circulation and that without a second-class mailing right they would be deprived of such circulation and might in some cases be forced to cease publication entirely.

Whether or not all or any of the articles which appeared in issues of The Milwaukee Leader which the Postmaster General alleges were declared non-mailable by the Postoffice Department, violated the Espionage Law, is immaterial to the questions here presented. The Espionage Law afforded a remedy for any public wrong committed by the appellant by the publication of any of said articles. As has been stated, it does not appear that either the Postmaster General or the Department of Justice nor any private person sought that remedy, and that there was ever a prosecution of the relator. The relator is entitled to the presumption that none of said articles infringed the law, and this presumption is fortified by the fact that in no instance was a prosecution instituted. There has been no competent and legally authorized finding by the Postmaster General himself that any of said articles infringed the Espionage Law; and even were he now to assert that he has made such a finding, the law does not empower him to determine the method of punishment and to inflict upon the relator a revocation of its second-class right.

Prior to the passage of the Espionage Act, the powers and duties of the Postmaster General had been clearly defined. The broadest duty ever heretofore imposed upon the Postmaster General was the duty in respect to fraudulent uses of the mails. The duty was expressly imposed. When, "upon evidence satisfactory to him,"

the Postmaster General finds that a fraudulent scheme, such as a lottery, "is being conducted," he may instruct his postmasters not to deliver to the person who is violating the law mail addressed to him. The constitutionality of the "fraud order" law was upheld in *Public Clearing House* v. *Coyne*, 194 U. S., 597, on the ground that in this legislation Congress was merely declaring what mail matter should be excluded from the mails. The right of Congress to exclude objectionable matter was identical with its right to classify mail matter and rested upon its constitutional authority "to establish postoffices and post roads." Since the postal service was "a public function established by Congress for the public welfare," it could authorize an executive officer to prevent such actual use of the mails as would assist in the consummation of a fraud on the public and thus defeat the very purpose of the service. Consequently the Postmaster General was given no authority to refuse mail deposited for transmission by the violator of the law. He could only refuse to deliver to him mail addressed to him. This mail had to be returned to the postoffice whence it was mailed, with the word "fraudulent" stamped on it. Even under these limitations, there might be some innocent mail thus returned. But the Court said that this would be an accidental result of an exercise of the valid power to exclude objectionable matter. The Court also did not fail to point out that the order only covered registered mail and that it did not affect the personal mail of the officers and agents of the Public Clearing House.

Because of Justice Brown's definition of the mail service as a "public function," the respondent in this case may assert that the Supreme Court held in that case that the use of the service is the exercise of a privilege and not of a right. But the question was not before

the Court, which carefully refrained from deciding any such point. In the later and ably argued case of *Lewis Publishing Co.* v. *Morgan*, 229 U. S., 288, the Court took pains to define the scope of its decisions. It said that in exercising the power it had over the mails Congress "was not excluding from the mails generally but only from the right to participate in and enjoy the privileges accorded by the second-class classification." The legislation was "not enacted as an exercise of legislative power to regulate the press, to curtail its freedom and under the assumption that there was a right to compel obedience to the command of legislation having that object in view, to deprive one who refused to obey, of all right to use the mail service."

The Supreme Court has never gone further than to say that Congress can determine what mail matter shall be excluded. It has not decided that either Congress or the Postmaster General has the right to exclude any particular person, or any class of persons, from the benefits of the use of the postal service. It has never decided that the general use of the mails is the exercise of a mere privilege to be granted or taken away by an executive officer.

There are apparently but two instances in the books where a Postmaster General has assumed to exercise authority over a citizen's general use of the mails. In *Hoover* v. *M'Chesney*, 81 Fed., 472, the Postmaster General issued a "fraud order" upon learning that complainant had been engaged about three months previously in conducting a lottery. The order was intended to and did deprive complainant of the use of the mails in *receiving* any mail matter of any kind or description. This Postmaster General assumed much the same position as respondent has assumed in the instant case. Because of alleged past violations of criminal statutes he

sought to prevent complainant from further use of the mails and thus prevent future violations which he assumed would occur. The question was thus squarely raised and the Court held that "the right to the use of the mail" was "a property right, and one which could not be taken away except by due process of law."

In the case of *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed., 579, the Postmaster General assumed in advance that what the newspaper would publish would be an advertisement of a lottery, and he instructed the local postmaster not to receive for mailing any copy of the paper which carried the advertisement he had in mind. The Court granted an injunction against him, saying that, as the mails had not yet been used, the postal law would not apply at all.

With these decisions in mind, the question involved becomes a simple one.

The Espionage Act merely provides that certain mail matter is "hereby declared to be non-mailable matter." In these seven words the respondent thinks he finds his authority to deny to relator all future use of the mails.

The issue should not be confused by the fact that respondent has merely concentrated his energies on the second-class right to which relator is entitled. The Espionage Act says not a word about the classification of the mails. If the act contains any justification for the respondent, that justification must be found in an authorization to exclude relator from *any use of the mails whatsoever*. The right involved is the right to use the mails generally, not the right to enjoy the privileges accorded by the second-class classification.

Now, how can there be found in these seven words the expression of an intention to impose as an additional penalty for previous violations of provisions of the Espionage Act a denial of any benefits to be enjoyed by

future use of the mails? Congress had used the words before, and even though we assume it believed it had the power summarily to destroy a citizen's right to use the mails for a lawful purpose, it had never presumed to exercise such a power. The farthest it ever went was in the "fraud order" legislation in which it was careful to delegate authority expressly and not by implication. And the authority it delegated was the authority to prevent an actually existing fraudulent use of the mails, not a presumed future fraudulent use. The limited power of the Postmaster General was confined to the time when a fraudulent scheme *"is being conducted."*

The character of this legislation and the language used prove conclusively that Congress did not impliedly make any such dangerous grant of power to an administrative officer,—dangerous because, whether the subject matter of such an implication be a "property right" as one Court says, or "a positive legal right," as the Court of Appeals says, or a "privilege," as the respondent says, it is indissolubly bound up with the most sacred of all rights, the right to life, liberty and the pursuit of happiness. The Espionage Act is a criminal statute and in its several provisions penalties are provided for specifically defined criminal *acts*. There is nothing in these provisions to indicate that Congress presumed to provide penalties for the harboring of a mere criminal intent, for a mere state of mind. A "seditious" statement was made a crime, and when that statement was put into a tangible form capable of being mailed it was declared non-mailable.

Section 1 of the 12th Title refers to "matter" or "things" that are capable of being mailed,—letters, pictures, books. A "newspaper" is the only one of the "things" enumerated which is ordinarily susceptible of definition as a continuing publication; but the word is

so used and the context is so plain that the reference is obviously to specific, published issues and not to contemplated publications, the contents of which do not exist and cannot be foretold. The language refers to something in existence and to human acts in respect thereto.

But let us assume, for argument, that one of those contemplated papers should carry an article in violation of the act. Then, and not till then, has a criminal act been committed and the subject matter of that act made non-mailable. But the respondent says that he will not accept in the second-class mail these future issues, irrespective of what they may contain. He, not the Espionage Act, declares them non-mailable in advance. Such a position is grotesque and a mere statement of it is its best refutation. He assumes a construction under which the act is supposed to punish mere criminal *intention* without any criminal *act* whatsoever coupled with it, when he assumes the criminality of the intention in relator's mind; and he bases that assumption on the further unsupported conclusion that the tendency of the relator's newspaper, in his opinion, is "seditious."

The absurdity of this position is further disclosed by the fact that respondent claims greater power under the so-called implications of the original Espionage Act than are actually granted to him under the amendments to that act. As the war progressed Congress put more teeth into the Espionage Act. It obviously decided that it should make a greater effort to close the mails to those who were using it to practice "espionage." Consequently, it added to Title XII a new section, Section 4, drawn in conformity with the old "fraud order" laws. "When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the

provisions of this Act," instruct his postmasters at post offices "at which mail is received addressed to such person or concern" to return to same marked, etc.

If he already had the power, as he contends, to deny any use of the mails whatsoever to those persons or concerns, then what did Congress intend by this amendment? If he already had the broadest powers that could be granted, what intention must we attribute to Congress in thus expressly granting him a much more limited power?

The Postmaster General will probably assert, as he did in the case of the *New York Call* (*United States of America, ex rel. Workingmen's Co-operative Publishing Association* v. *Burleson, supra*) that his action in revoking the second-class mailing permit of The Milwaukee Leader involved an exercise of judgment and discretion on his part and that the exercise of judgment and discretion by him and his action are not subject to be reviewed, reversed, set aside or controlled by a court of law, and that his action in that behalf cannot be commanded, directed or controlled by the writ of mandamus. The office of the Postmaster General is an important one, but it seems that the Postmaster General has an exaggerated understanding of his powers and an insufficient estimate of the power of the court. His acts with respect to the granting and revoking of second-class mailing permits are essentially ministerial acts and are subject to review by the courts. If this were not the fact, his would be a most autocratic power to destroy upon a mere whim or for no explained legal cause, any and every publication with whose politics and policies he did not agree. Whether a newspaper be Socialist, Republican or Democratic in its political sympathies, pro-administration or anti-administration, in favor of or against a declaration of war, in favor of or against a speedy termination of a war in progress—all these are questions which are not to be con-

sidered in connection with the granting or revocation of second-class mailing rights. The Postmaster General indicates that he does not approve of the tendency or policy of The Milwaukee Leader. The tendency or policy of The Milwaukee Leader as understood by the Postmaster General may be one thing and its actual policy as understood and advanced by its editor may be and in fact is quite a different thing. This policy has at no time in the course of the proceedings before the Postmaster General or in the pleadings before the Court in this action been defined, and it is quite immaterial what the policy may be. It is significant, however, that the question of a newspaper's policy is apparently being taken into consideration by the Postmaster General in determining whether or not it shall enjoy the second-class mailing rights which the statute decrees it is entitled to upon conforming with certain enumerated requirements. None of these requirements pertain to the question of policy, political or otherwise. It is a new and dangerous course which the Postmaster General has adopted. It is wholly contrary to the principles upon which this government exists. It is a usurpation of power, the unauthorized creation of a censorship which menaces the freedom of the press of America. It must be disapproved and overridden by the Court, which clearly has the right to review the acts of the Postmaster General in this action.

In *Schaefer* v. *United States*, 251 U. S., 466, which was a prosecution upon an indictment under the Espionage Act, Mr. Justice Brandeis, in a dissenting opinion, concurred in by Mr. Justice Holmes, said at page 494:

> "To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities."

The reference made by the learned Justices to the assumption of powers by the postal authorities is of especial significance in the consideration of the circumstances of the present case.

The question to be determined by the Court upon this appeal is whether or not the Postmaster General is above the law and may create new laws to suit his convictions or prejudices.

To the Postmaster General is committed the duty of administering the Postal Laws, and this duty includes the granting of second-class mailing rights to such publications as conform with the statutory requirements. The Postmaster General is bound by law to grant the necessary permit and to admit the publication to the second-class mails. We have his admission that The Milwaukee Leader was entitled to second-class mailing rights, for it enjoyed those rights for a considerable period until they were arbitrarily and illegally withdrawn by the Postmaster General.

The nature of the publication has not changed. It is manifestly a daily newspaper under the law and one which comes within the second-class mail classification.

Whatever discretion the Postmaster General must exercise in considering and determining whether or not a publication is entitled to admission into the second-class mails is a discretion incident to the performance of ministerial duties and not an incident to the performance of judicial duties. Whether such discretion is incidental to the performance of ministerial or of judicial duties, the acts of the official performing them are nevertheless subject to review by the courts. In *West* v. *Hitchcock*, 19 App. D. C., 333, the relator sought a writ of mandamus to the Secretary of the Interior, and the Court said at page 342:

> "By a long and well known series of cases in the Supreme Court of the United States, from that

of *Marbury* v. *Madison*, 1 Cranch, 137, to that of *Roberts* v. *U. S.*, 176 U. S., 221, the law of mandamus has been well settled so far as it concerns the authority of the courts of the District of Columbia to issue that writ to the head of a department of the federal government or the chief of a bureau upon whom some such duty has been devolved by law. These decisions have firmly established the doctrine that the writ of mandamus will be issued to compel the performance of a ministerial duty by such officer, but that it will be refused when the duty required of him involves the exercise of judicial or quasi-judicial discretion. * * * It is conceded that the relator has taken all the steps and complied with all the requirements of the law to entitle him to his allotment and it is not controverted that he is a proper person to receive the allotment. * * * The sole defense interposed by the appellee to the relator's right in the premises is the proposition that the case is one wherein the Secretary of the Interior was required to exercise judgment and discretion, that the control of Indian affairs is a political function vested by Congress in the executive branch of the government, that the power to approve in this instance involved the power to disapprove, that this necessarily implies the exercise of judgment, that the refusal of the Secretary to approve the allotment amounts to a disapproval and rejection of it, and that any attempt to control his judgment therein would be an exercise of appellate power which is not given to the courts.

"We think that this proposition in the present case is based upon a misapprehension of the law and cannot be sustained.

"The fact that an act which mandamus seeks to compel is the culmination of a series of proceedings of a judicial or quasi-judicial nature or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus when the officer or person charged to perform it, arbitrarily and

without just legal cause refuses such performance. This is so even in reference to strictly judicial proceedings. For a trial court to settle a bill of exceptions or to approve an appeal bond is a judicial function requiring the exercise of judgment and discretion, and yet if the judge holding the trial court arbitrarily refuses to settle such bill of exceptions, when in due form it has been duly tendered to him, or arbitrarily refuses to approve such appeal bond, when it has been duly submitted to him for approval and is in all respects satisfactory and subject to no reasonable objection, it is elementary law which requires no elaboration and no citation of authority for its support, that, while his judgment may not be coerced, the performance of his duty may be required of him by means of the writ of mandamus. Indeed it may be laid down as a general rule, that, while the judgment of a judicial officer or of an officer charged with the performance of a judicial or quasi-judicial duty, will not be controlled through the writ of mandamus, and this writ will not be used as a means for the review of the exercise of such judgment, yet any act required by law to be done, whether in the course of judicial proceedings or otherwise, may be compelled by mandamus from a superior tribunal, or a tribunal of general jurisdiction, as the case may be, when its performance is withheld by a mere arbitrary exercise of power without just cause. There is no step in the course of judicial proceeding which may not be the subject of mandamus when its performance is unlawfully refused.

(p. 344) "Now if this be the case in strictly judicial proceedings, it is even more so in regard to the functions of executive officers in the performance of acts wherein individual citizens are interested. To grant a patent for lands, or for an invention in the arts or for a discovery in the sciences, is a quasi-judicial function of the highest nature which has been committed by Congress

to the executive officers of the government, and the granting or refusal of such a patent ordinarily cannot be questioned in the courts. But when all the proper prerequisites have been complied with and all the preliminary steps have been taken whereby a party has in law become entitled to a patent and nothing remains to be done but to issue the patent, it is well settled that such patent may not then arbitrarily and without just cause be withheld and that its execution and delivery may be enforced by the writ of mandamus. *Butterworth* v. *Hoe*, 112 U. S., 50; *United States* v. *Schurz*, 102 U. S., 378; *Dunlap* v. *Black*, 128 U. S., 40. It has been well said that under our republican system of government there is no place for the exercise of arbitrary power.

"It is not to be denied that, in the administration of the law the provisions of which it is sought here to enforce, a certain amount of discretion is reposed in the Secretary of the Interior and the officers of the Land Office under his control. But that discretion has been expended. It is conceded by the pleadings in this case that the relator has done everything required by the statute to be done by him; that he is a proper person to receive the allotment which he seeks; that his selection of land is right and proper; that such selection infringes no other right and that there is no reason whatever why his selection should not be approved. We may infer of course that there is some secret reason for disapproval not disclosed in the record; but if such secret reason there be, the courts can take no cognizance of it. The only ground whatever of objection set up to the writ is that the case is one involving the exercise of judgment and discretion on the part of the Secretary. But the plain answer to this argument is that the judgment and discretion have been exercised and that the only thing which now remains to be done is the final expression of that judgment, as in the case of *Butterworth* v. *Hoe*, *supra*, by the execu-

tion and delivery of a certificate of approval, which, in contemplation of law, is a purely ministerial duty.

(p. 346) "The history of adjudication on the subject of mandamus is sufficient to show that the courts should be cautious not to interfere with the independent freedom of action guaranteed by the Constitution and the laws to the executive officers of government; but it is also sufficient to show that the writ of mandamus will be freely resorted to in order to enforce individual right against arbitrary action, however well intended such action may be, when the relator has no other available remedy. *Roberts* v. *United States,* 176 U. S., 221."

In *Roberts* v. *United States,* 176 U. S., 221, the Court said at page 231:

"Unless the writ of mandamus is to become practically valueless and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must obey the law and he must therefore in a certain sense construe it in order to form a judgment from its language of what duty he is directed by the statute to perform. But that does not necessarily in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that

> the performance of the duty involved the construction of a statute by him and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court we think would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

No great exercise of judgment or discretion is necessary to determine whether or not a newspaper or periodical has conformed with the requirements of the statute pertaining to the admission of matter into the second-class mails. Nor does the Postmaster General assert that The Milwaukee Leader has in any way failed to conform with the requirements of the statute.

There is no question presented of a doubt as to the proper classification of the relator's publication. It is concededly a daily newspaper, although the Postmaster General has asserted that it is not a newspaper within the meaning of the law because it is in conflict with the Espionage Law, but this assertion cannot be taken seriously. The Espionage Law is in no way concerned with mailable matter which belongs to any special classification. The provisions of the Espionage Law governing non-mailable matter affect only particular books, papers and periodicals, etc., which contain matter which is in alleged violation of any of the provisions of the Espionage Law. The Espionage Law imposes no penalties with respect to abrogation of second-class mailing rights. Nor does the Postmaster General assert that the law gives him a right to inflict such a penalty.

A clear and controlling statement of the law governing

a proceeding of this kind was presented in the case of *Payne* v. *United States ex rel. National Railway Publishing Co.*, 20 App. D. C., 581. This was a mandamus proceeding to require the Postmaster General of the United States to admit into the mails, for transmission as second-class mail matter, a certain periodical publication, which the Postmaster General held to be mail matter of the third class. The publication was known as "The Official Guide of the Railways and Steam Navigation Lines of United States, Porto Rico, Mexico and Cuba," and was published monthly in New York. The Court said at page 596:

> "The principal question here, as in all cases of this character, is whether the act sought to be performed is of a ministerial or of a judicial character as those terms have been defined and limited by the courts. For, as pointed out in the case of the *United States ex rel. West* v. *Hitchcock*, 19 App. D. C., 333, there is no ministerial act to which the writ of mandamus would be applicable that does not in some measure and to some extent involve the exercise of judgment and discretion, and there are acts apparently judicial which are not so in contemplation of law. An act may be ministerial in this connection, although it may occur in the course of judicial proceedings or in the exercise of discretionary power, when it is merely a ministerial thing to be done after the judicial authority over the subject matter has been exercised. * * * It is very clear that the Congress of the United States has not committed to the Postmaster-general or to anyone else the matter of determining what should be carried in the mails as second class matter and what as matter of the third class. It has reserved that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster-general to add anything to the statute or to take anything from it. It may be that the classification has not been made with

all the definiteness that is desirable. It may be, even, that the privilege of the mails has been grossly abused by the introduction into them of mail matter of the second class which was never anticipated by Congress. * * * Yet it is not the province of the Postmaster-general to remedy the evil, if evil there is, by a postal regulation or by unwarranted interpretation of the law.

"The citizen who desires to have his publication carried in the mails of the United States as second class mail matter, and who has fully and fairly complied with all of the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be enforced by the writ of mandamus if the Postmaster-general arbitrarily or without valid legal reason refuses to receive and transmit such publication. Of course, the Postmaster-general and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute."

(p. 600) "It is conceded that the relator has complied with all the requirements of the statute and that the characteristics of its publication are literally and specifically as therein prescribed; and it appears that the exclusion of the periodical from the mails, as second class matter, is based exclusively and in express terms upon its failure to comply with the super-added requirement of the postal regulation that it must 'consist of current news.' Under the doctrine of the cases of *Butterworth* v. *Hoe*, 112 U. S., 50; *United States* v. *Schurz*, 102 U. S., 378; *Dunlap* v. *Black*, 128 U. S., 40; *Roberts* v. *U. S.*, 176 U. S., 221; *American School of Magnetic Healing* v. *McAnnulty*, at the present term (Oct. 1902), (187 U. S.); *U. S.* v.

Hitchcock, 19 App. D. C., 333, and other cases, we must hold that the ground of exclusion is insufficient in law and that the relator is entitled to the writ of mandamus for the enforcement of its right in the premises.

"Very greatly to the point is the case just cited of the *American School of Magnetic Healing* v. *McAnnulty*, decided November 17, 1902, by the Supreme Court of the United States, at its present term. There the Postmaster-general of the United States, called upon to construe and enforce the Act of Congress of September 19, 1900, to prevent the use of the mails for the collection of money by false and fraudulent devices, directed the exclusion from the mails of letters addressed to or intended for the American School of Magnetic Healing, an organization established at Nevada, in the State of Missouri, for the cure of all human ailments by mental or magnetic processes. There was great plausibility in his course and he was undoubtedly called upon to exercise a certain amount of judgment and discretion in the application of the law. But the Supreme Court, by Mr. Justice PECKHAM, said:

> 'That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action of the head or one of the subordinate officials of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief. * * *
>
> 'Here it is contended that the Postmaster-general has in a case not covered by the Acts of Congress excluded from the mails letters addressed to the complainants. His right to exclude letters or to refuse to permit their delivery to persons addressed must depend upon

some law of Congress and, if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, arguendo, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of of the Postmaster-general that such violation had occurred, based upon some evidence to that effect, would be conclusive and final and not the subject of review by any court. Yet to that assumption must be added the statement that if the evidence before the Postmaster-general in any view of the facts failed to show any violation of a Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because, the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster-general has ordered the retention of letters directed to the complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster-general, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

'The facts which are here admitted of record show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster-general has assumed to act and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts and the courts, therefore, must have power, in a proper proceeding, to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in

violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld. * * *

'Although the Postmaster-general had jurisdiction over the subject matter (assuming the validity of the acts) and, therefore, it was his duty, upon complaint being made, to decide the question of law, whether the case stated was within the statute, yet such a decision being a legal error does not bind the courts.'

"It seems to us that this case is decisive of that now before us."

In the case just cited a petition for a writ of certiorari to the Court of Appeals of the District of Columbia was granted by the United States Supreme Court (189 U. S., 512), and later upon motion of the Attorney General himself the appeal was dismissed with costs (192 U. S., 602).

As has been stated, the Espionage Law confers no power upon the Postmaster General to revoke second-class mailing privileges. A daily newspaper may consciously or unconsciously, with or without intent, publish matter which falls within the inhibition of the statute. It may publish such matter in several issues and it may then cease entirely publishing such matter, and its columns thereafter may be wholly free from any matter which may be objectionable under any statute. No statute and no court decision has ever gone so far as to forbid for all time the publication of a newspaper or its circulation through any classification of the mails because of one or more specific violations of law.

To justify the Postmaster General's conduct would necessitate a complete revision of our system of jurisprudence. It would be necessary to permit the Postmaster General to revise the Espionage Law, and to

strike from the United States Constitution that part of the First Amendment which prohibits Congress from making any law abridging the freedom of the press.

Society is composed of men of varying convictions and opinions. These convictions and opinions are expressed either verbally or in writing or through the far-reaching medium of the press. Only by free discussion of public questions can the nation progress. A nation which stifles free discussion, however displeasing such discussion may be to any group of officials temporarily in places of power, soon loses the respect of its citizens. In this country our system of law furnishes redress through the courts for any injustice practiced by a private individual or a public official. The Congress has enacted the Postal Laws for the salutary purpose of enabling the people of the country to communicate information and opinions to one another through the mails. The rights conferred by these statutes must be respected, and above all they must be respected by those public officials who are charged with their administration. It may be that the Postmaster General in the present case has acted in entire sincerity but through a misconception of his powers. The wrong to the relator that has resulted from the Postmaster General's wilful or perhaps unintentional misuse of his powers can be righted by this Court. The relator has shown that it has a clear legal right to the second-class mail classification. It is the Postmaster General's duty to continue the transmission of The Milwaukee Leader through the second-class mails. The existence of relator's right and the Postmaster General's duty are the sole essential prerequisites to the granting of the writ of mandamus which the relator applies for. The statute above quoted provides that a publication which conforms with the several conditions enumerated in the statute *shall be admitted to the second-class.* The Postmaster General

is the sole public official who has charge of the classification of mail matter and the administration of the Postal Laws. The statutory declaration that the publication shall be admitted to the second-class mails is an imperative mandate to the Postmaster General which he cannot evade, and having been admitted to said classification, it cannot be removed therefrom unless it has ceased to comply with the statutory requirements for second-class matter. The Milwaukee Leader has not ceased to be a daily newspaper conforming with those requirements. The Postmaster General's revocation of the second-class right, which the statute virtually commands him to continue, is tantamount to a violation of a public duty which the law of the land has expressly imposed upon him. That mandamus will lie in this case, there can be no question.

CONCLUSION.

The relief sought by the appellant, through the writ of mandamus for which the relator petitions, should be granted.

Dated, January 6, 1921.

Respectfully submitted,

S. JOHN BLOCK,

SETH SHEPARD,

Attorneys for Workingmen's Co-operative Publishing Association amicus curiae.

SUPREME COURT OF THE UNITED STATES.

No. 155.—October Term, 1920.

The United States of America *ex rel.* Milwaukee Social Democratic Publishing Company, Plaintiff in Error, *vs.* Albert S. Burleson, Postmaster General of the United States. | In Error to the Court of Appeals of the District of Columbia.

[March 7, 1921.]

Mr. Justice Holmes, dissenting.

I have had the advantage of reading the judgment of my brother Brandeis in this case and I agree in substance with his view. At first it seemed to me that if a publisher should announce in terms that he proposed to print treason and should demand a second-class rate it must be that the Postmaster General would have authority to refuse it. But reflection has convinced me that I was wrong. The question of the rate has nothing to do with the question whether the matter is mailable, and I am satisfied that the Postmaster cannot determine in advance that a certain newspaper is going to be non-mailable and on that ground deny to it not the use of the mails but the rate of postage that the statute says shall be charged.

Of course the Postmaster may deny or revoke the second-class rate to a publication that does not comply with the conditions attached to it by statute, but as my brother Brandeis has pointed out, the conditions attached to the second-class rate by the statute cannot be made to justify the Postmaster's action except by a quibble. On the other hand the regulation of the right to use the mails by the Espionage Act has no peculiarities as a war measure but is similar to that in earlier cases, such as obscene documents. Papers that violate the Act are declared non-mailable and the use of the mails for the transmission of them is made criminal. But the only power given to the Postmaster is to refrain from forwarding the

papers when received and to return them to the senders. Act of June 15, 1917, c. 30, Title XII; 40 Stat. 217, 230. Act of May 16, 1918, c. 75; 40 Stat. 553 554. He could not issue a general order that a certain newspaper should not be carried because he thought it likely or certain that it would contain treasonable or obscene talk. The United States may give up the Postoffice when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. There is no pretence that it has done so. Therefore I do not consider the limits of its constitutional power.

To refuse the second-class rate to a newspaper is to make its circulation impossible and has all the effect of the order that I have supposed. I repeat. When I observe that the only powers expressly given to the Postmaster General to prevent the carriage of unlawful matter of the present kind are to stop and to return papers already existing and posted, when I notice that the conditions expressly attached to the second-class rate look only to wholly different matters, and when I consider the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights, I am of opinion that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute and was a serious attack upon liberties that not even the war induced Congress to infringe.

SUPREME COURT OF THE UNITED STATES.

No. 155.—October Term, 1920.

The United States of America, *ex rel.* Milwaukee Social Democratic Publishing Company, Plaintiff in Error, *vs.* Albert S. Burleson, Postmaster General of the United States.	In Error to the Court of Appeals of the District of Columbia.

[March 7, 1921.]

Mr. Justice Clarke delivered the opinion of the Court.

After a hearing on September 22, 1917, by the Third Assistant Postmaster General, of the time and character of which the relator (plaintiff in error) had due notice and at which it was represented by its president, an order was entered, revoking the second-class mail privilege granted to it in 1911 as publisher of the Milwaukee Leader. So far as appears, all that the relator desired to say or offer was heard and received. This hearing was had and the order was entered upon the charge that articles were appearing in relator's paper so violating the provisions of the National Defense law, approved June 15, 1917, which has come to be popularly known as the Espionage Act of Congress (40 Stat. 217), as to render it "non-mailable" by the express terms of Title XII of that act. On appeal to the Postmaster General the order was approved. Thereupon the relator filed a petition in the Supreme Court of the District of Columbia, praying that a writ of mandamus issue, commanding the Postmaster General to annul his order and restore the paper to the second-class privilege. To a rule to show cause the Postmaster General answered, and a demurrer to his answer being overruled and the relator not pleading further, the court discharged the rule and dismissed the petition. The Court of Appeals of the District of Columbia affirmed the judgment of the trial court, and the constitutional validity of laws of

the United States being involved the case was brought here by writ of error.

The grounds upon which the relator relies, are, in substance, that to the extent that the Espionage Act confers power upon the Postmaster General to make the order entered against it, that act is unconstitutional, because it does not afford relator a trial in a court of competent jurisdiction, that the order deprives relator of the right of free speech, is destructive of the rights of a free press, and deprives it of its property without due process of law.

That a hearing, such as was accorded the relator, on precisely such a question as is here involved, when fairly conducted, satisfies all of the requirements of due process of law, has been repeatedly decided. *Smith* v. *Hitchcock*, 226 U. S. 53, 60; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.

Since the petition in this case was filed, it has also become settled that the Espionage Act is a valid, constitutional law. *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616, 619.

The first comprehensive law providing for the classification of mails was enacted on March 3, 1879 (20 Stat. 355). From that time to this, mail classification, frequently approved by this Court, has dealt only with "mailable matter." In section 7 of that act, still in effect, "mailable matter" is divided into four classes, and, by section 10, the second class of such "mailable matter" is defined as including newspapers and periodicals. By sec. 1 of Title XII of the Act of June 15, 1917 *supra*, any newspaper violating any provision of the act is declared to be "non-mailable matter," which shall "not be conveyed in the mails or delivered from any post office or by any letter carrier."

The extremely low rate charged for second-class mail—to carry it, was said, in argument, to cost seven times the revenue which it yields—is justified as a part of "the historic policy of encouraging by low postal rates the dissemination of current intelligence." It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes

is derived from the newspaper and other periodical press. 229 U. S. 301, 304.

By now more than forty years of departmental practice, admission to the privilege of this second-class mail has been obtained for a publication only by a permit, issued by the Postmaster General after a hearing and upon a showing made, satisfactory to him, or his authorized assistants, that it contains and will continue to contain only mailable matter and that it will meet the various statutory and other requirements. *Houghton* v. *Payne*, 194 U. S. 88, 94.

That the power to suspend or revoke such second-class privilege was a necessary incident to the power to grant it has long been recognized by statute and by many decisions of this Court. (31 Stat. 1107; *Smith* v. *Hitchcock*, 226 U. S. 53, 57; *Houghton* v. *Payne*, 194 U. S. 88; *Gates & Guild Co.* vs. *Payne*, 194 U. S. 106). Under these statutes and decisions, if the newspaper of the relator had come to be so edited that it contained other than "mailable matter", plainly it was the intention of Congress that it should no longer be carried as second-class mail and therefore the order to revoke the permit which had been granted to relator was proper and justified,—and that it had become so changed in character is the holding of the Postmaster General and of the two lower courts which we are reviewing.

For the purpose of preventing disloyalty and disunion among our people of many origins, and to the end that a united front should be presented to the enemy, the Espionage Act, one of the first of the National Defense laws enacted by Congress after the entry of the United States into the World War (approved June 15, 1917, 40 Stat. 217), provided severe punishment for any person who "when the United States is at war" shall wilfully make or convey false reports or false statements with intent to interfere with the operation and success of the military or naval forces of the country, or with the intent to promote the success of its enemies, or who shall cause, or attempt to cause, insubordination, disloyalty, mutiny or refusal of duty in such forces, or who shall wilfully obstruct the recruiting and enlistment service of the United States (Section 3). One entire title of this act (Title XII) is devoted to "Use of the Mails," and in the exercise of its

practically plenary power over the mails (*Ex parte Jackson*, 96 U. S. 727; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506, 507; *Lewis Publishing Company* v. *Morgan*, 229 U. S. 288, 313), Congress therein provided that any newspaper published in violation of any of the provisions of the act should be *"non-mailable"* and *should not be "conveyed in the mails or delivered from any post office or by any letter carrier."*

It was under the provisions of this war-time act, and under the specific injunction of section 396 of the Revised Statutes of the United States, declaring it to be the duty of the Postmaster General to "superintend generally all the business of the [Post Office] Department and to execute all laws relating to the postal service," that the order in this case was entered.

The Postmaster General avers that upon the hearing which we have described, he found that, beginning within a week after the declaration of war against the German Government and continuing to the date of the revocation of the second-class privilege herein, the relator had published in its newspaper frequently, often daily, articles which contained false reports and false statements, published with intent, to interfere with the success of the military operations of our Government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service. For this cause, exercising the power which we have seen had been invested in the Postmaster General by statute for almost forty years, and which had frequently been exercised by his predecessors, the respondent revoked the second-class privilege which had been granted to the relator. A similar executive authority with respect to matters within their jurisdiction has been given to the heads of all the great departments of our Government and is constantly exercised by them.

This is neither a dangerous nor an arbitrary power, as was argued at the bar, for it is not only subject to review by the courts [the claim of the relator was heard and rejected by two courts before this re-examination of it in this Court] but it is also subject to control by Congress and by the President of the United States. Under that Constitution, which we shall find it vehemently denouncing, the rights of the relator were, and are, amply protected by the opportunity thus given it to resort for relief to all

three departments of the Government, if those rights should be invaded by any ruling of the Postmaster General.

All this being settled law, there remains the question whether substantial evidence to support his order may be found in the facts stated in the Postmaster General's answer, which are admitted by the demurrer, for the law is, that the conclusion of the head of an executive department of the Government on such a question, when within his jurisdiction, will not be disturbed by the courts unless they are clearly of the opinion that it is wrong. *Smith* v. *Hitchcock*, 226 U. S. 53, 60; *Houston* v. *St. Louis, &c. Packing Co.*, 249 U. S. 479, 484, and cases cited.

In the answer of the Postmaster General there were quoted more than fifty excerpts from editorial articles which appeared in relator's newspaper at intervals between April 14 and September 13, 1917,—the first five months after our country entered the great war —upon consideration of which, with others not reproduced, he averred, his order was based.

Without going much into detail. It was declared in the quoted articles, that the war was unjustifiable and dishonorable on our part, a capitalistic war, which had been forced upon the people by a class, to serve its selfish ends. Our Government was denounced as a "plutocratic republic," a financial and political autocracy, and resident Russians were praised for defaming it. Other articles denounced the draft law as unconstitutional, arbitrary and oppressive, with the implied counsel that it should not be respected or obeyed, and it was represented that soldiers in France were becoming insane in such numbers that long trains of closed cars were being used to convey them away from the battle front. It was confidently asserted that the Constitution of the United States was purposely made difficult of amendment in order that we might not have real democracy in this country, the President was denounced as an autocrat, and the war legislation as having been passed by a "rubber stamp Congress." In the guise of argument these articles sought to convince the readers of them that soldiers could not legally be sent outside the country and that our Government was waging a war of conquest when Germany was ready to make an honorable peace. The Food Control law was denounced as "Kaiserizing America." It was declared that we

were fighting for commercial supremacy and world domination only and that when the "financial kings" concluded that further fighting might endanger their loans to the Allies, they would move for peace, which would quickly come. Our "Allies" were repeatedly condemned and our enemies frequently praised.

These publications were not designed to secure amendment or repeal of the laws denounced in them as arbitrary and oppressive, but to create hostility to, and to encourage violation of, them. Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it.

Without further discussion of the articles, we cannot doubt that they conveyed to readers of them, false reports and false statements with intent to promote the success of the enemies of the United States, and that they constituted a willful attempt to cause disloyalty and refusal of duty in the military and naval forces and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law (*Schenck* v. *United States, Frohwerk* v. *United States*, and *Debs* v. *United States, supra*), and that therefore their publication brought the paper containing them within the express terms of Title XII of that law, declaring that such a publication shall be "non-mailable" and "shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

While written more adroitly than the usual pro-German propaganda of that time, they nevertheless prove clearly that the publisher of these articles was deliberately and persistently doing all in its power to deter its readers from supporting the war in which our Government was engaged and to induce them to lend aid and comfort to its enemies. The order of the Postmaster General not only finds reasonable support in this record but is amply justified by it.

We shall notice further only the contention that if it should be found that the Postmaster General had authority to revoke the second-class privilege as to a single issue of the paper, nevertheless

he did not have power to make such an order applicable to the indefinite future.

The second-class privilege ever since 1879 has been granted to a newspaper, as we have seen, only on application of its publisher for entry of it to that class. Upon such an application, a searching investigation of the character of the publication is made by the Postmaster General, under rules and regulations prescribed by him, which experience has proved necessary to prevent frauds upon the Government (United States Postal Laws and Regulations, 1913, Sections 411 to 435, inclusive; 229 U. S. 306), and two representative copies of the issue nearest to the date of the application are required to be filed. If the publication is found to be entitled to the second-class privilege, a permit to that effect is issued, which contains, as did the permit to the relator, the provision that "the authority herein given is revocable upon determination by the Department that the publication does not conform to law." Such a permit, however, would be equally revocable without any such specific reservation. (31 Stat. 1107; *Smith* v. *Hitchcock*, 226 U. S. 53, 60).

It is a reasonable presumption that the character of the publication as one entitled to the second-class privilege, when thus established, will continue to be substantially maintained, and therefore such a permit is made applicable to the indefinite future. For the same reason, and because it would not be practicable to examine each issue of a newspaper, the revocation of a permit must continue until further order. Government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country to approve in advance each issue before it should be allowed to enter the mails, and when, for more than five months, a paper had contained, almost daily, articles which, under the express terms of the statute, rendered it "non-mailable," it was reasonable to conclude that it would continue its disloyal publications and it was therefore clearly within the power given to the Postmaster General by R. S., section 396, "to execute all laws relating to the postal service", to enter, as was done in this case, an order suspending the privilege until

a proper application and showing should be made for its renewal. The order simply withdrew from the relator the second-class privilege, but did not exclude its paper from other classes, as it might have done, and there was nothing in it to prevent reinstatement at any time. It was open to the relator to mend its ways, to publish a paper conforming to the law, and then to apply anew for the second-class mailing privilege. This it did not do, but, for reasons not difficult to imagine, it preferred this futile litigation, undertaken upon the theory that a Government competent to wage war against its foreign enemies was powerless against its insidious foes at home. Whatever injury the relator suffered was the result of its own choice and the judgment of the Court of Appeals is

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 155.—October Term, 1920.

The United States of America *ex rel.* Milwaukee Social Democratic Publishing Company, Plaintiff in Error,
vs.
Albert S. Burleson, Postmaster General of the United States.

In Error to the Court of Appeals of the District of Columbia.

[March 7, 1921.]

Mr. Justice Brandeis, dissenting.

This case arose during the World War; but it presents no legal question peculiar to war. It is important, because what we decide may determine in large measure whether in times of peace our press shall be free.

The denial to a newspaper of entry as second-class mail, or the revocation of an entry previously made, does not deny to the paper admission to the mail; nor does it deprive the publisher of any mail facility. It merely deprives him of the very low postal rates, called second class, and compels him to pay postage for the same service at the rate called third class, which was, until recently, from eight to fifteen times as high as the second-class rate.[1] Such is the nature and the only effect of an order denying or revoking the entry. See Postal Laws and Regulations, Sections 421, 422 and 423. In this case entry to the second-class mail was revoked because the paper had, in the opinion of the Postmaster General, systematically inserted editorials and news items which he deemed

[1] Act of March 3, 1885, c. 342, sec. 1, 23 Stat. 387; Act of March 3, 1879, c. 180, sec. 17, 20 Stat. 359-360. Compare Act of October 3, 1917, c. 63, sec. 1101, 40 Stat. 327. See Message of the President, February 22, 1912, transmitting the Report of the Commission on Second-Class Mail Matter, 62d Cong., 2d Session, H. R. Doc. 559, pp. 56-61.

unmailable. The question presented is: Did Congress confer upon the Postmaster General authority to deny second-class postal rates on that ground? The question is one of statutory construction. No such authority is granted in terms in the statutes which declare what matter shall be unmailable. Is there any provision of the postal laws from which the intention of Congress to grant such power may be inferred? The specific reason why the Postmaster General deemed these editorials and news items unmailable was that he considered them violative of Title XII of the Espionage Act. But it is not contended that this specific reason is of legal significance. The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails.[2] The question of the scope of the Postmaster General's power is presented to us on the following record:

Some years prior to 1917 The Milwaukee Leader, a daily newspaper published by the Milwaukee Social Democratic Publishing Company, made application to use the second-class mail, was declared entitled to do so, and thereafter used it continuously. It built up a large circulation, of which about 9,000 copies were distributed daily through the second-class mail. In September, 1917, its publisher was directed to show cause

"why the authorization of admission . . to the second-class mail (matter) should not be revoked upon the following ground:

"The publication is not 'a newspaper or other periodical publica-

[2]Criminal Code, Sec. 211 (obscene matter, information concerning abortion); Sec. 212 (obscene, libelous or threatening matter upon envelopes or postal cards); Sec. 213 (matter concerning lotteries); Sec. 215 (schemes to defraud); Sec. 217 (poisons, insects, reptiles, explosives, intoxicating liquors); by Act of March 4, 1911, c. 241, Sec. 2, Section 211 of the Criminal Code, *supra*, was amended to include matter of a character to incite arson, murder, or assassination; by Act of March 3, 1879, c. 180, sec. 15, 20 Stat. 359, matter violating copyright laws was excluded; by Act of July 31, 1912, c. 263, sec. 1, 37 Stat. 240, prize-fight films were excluded; by Act of March 3, 1917, c. 162, sec. 5, 39 Stat. 1069, advertisements and solicitations for orders for intoxicating liquors in prohibition States.

tion' within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in Section 481½ Postal Laws and Regulations."

That section relates not specifically to the second-class mail; but to all mail. It recites the provisions of Title XII of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 230, which declares unmailable all letters, pictures, publications and things "in violation of any of the provisions" of that Act, and prescribes fine and imprisonment as punishment for the use or attempt to use the postal service for the transmission of such unmailable matter.[2] On this notice to show cause the Third Assistant Postmaster General held the customary informal hearing. The publisher of The Milwaukee Leader had not been convicted by any court of violating the Espionage Law; and its representative denied that it had ever committed any act in violation of it. But the Third Assistant Postmaster General issued on October 3, 1917, to the postmaster at Milwaukee the instruction that The Milwaukee Leader

"is not entitled to transmission in the mail at second-class rates of postage because it appears from the evidence in possession of the Department that the publication is not a 'newspaper or other periodical publication' within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in Section 481½, Postal Laws and Regulations."

This determination and action were confirmed by the Postmaster General; and the postmaster at Milwaukee thereafter denied to the publication transmission at the rates provided by law for second-class mail. The order did not forbid to The Milwaukee Leader all use of the mails; nor did it limit in any way the use of the mail facilities; it merely revoked the so-called second-class mailing permit; and the effect of this was to impose a higher rate of postage on every copy of the newspaper thereafter mailed.

The return filed herein by the Postmaster General alleges that this order "involved the exercise of judgment and discretion on

[2]Like punishment is provided in all statutes referred to in note 2; except that mailing matter violative of the copyright law is not punishable criminally. The maximum punishment for mailing prize-fight films is a fine of $1,000 and imprisonment for one year.

his part" and is "not subject to be reviewed, set aside, or controlled by a court of law;" but he gives this justification for his action:

"By representations and complaints from sundry good and loyal citizens of the United States and from personal reading and consideration of the issues of the said relator's publication, from the date of the declaration of war down to the time of the service of the citation upon it and the hearing granted in pursuance thereof, it seemed to this respondent in the exercise of his judgment and discretion and in obedience to the duty on him reposed, as well by the general statutes as by the special provisions of said Espionage Law, that the provisions of the latter act were systematically and continually violated by the relator's publication."

It thus appears that the Postmaster General, in the exercise of a supposed discretion, refused to carry at second-class mail rates all future issues of The Milwaukee Leader, solely because he believed it had systematically violated the Espionage Act in the past. It further appears that this belief rested partly upon the contents of past issues of the paper filed with the return and partly upon "representations and complaints from sundry good and loyal citizens," whose statements are not incorporated in this record and which do not appear to have been called to the attention of the publisher of The Milwaukee Leader at the hearing or otherwise. It is this general refusal thereafter to accept the paper for transmission at the second-class mail rates which is challenged as being without warrant in law.

In discussing whether Congress conferred upon the Postmaster General the authority which he undertook to exercise in this case, I shall consider, first, whether he would have had the power to exclude the paper altogether from all future mail service on the ground alleged; and second, whether he had power to deny the publisher the second-class rate.

First. Power to exclude from the mails has never been conferred in terms upon the Postmaster General. Beginning with the Act of March 3, 1865, c. 89, sec. 16, 13 Stat. 507, relating to obscene matter and the Act of July 27, 1868, c. 246, sec. 13, 15 Stat. 196, concerning lotteries, Congress has from time to time forbidden the deposit in the mails of certain matter. In each instance,

in addition to prescribing fine and imprisonment as a punishment for sending or attempting to send the prohibited matter through the mail, it declared that such matter should not be conveyed in the mail, nor delivered from any post office nor by any letter carrier.[4] By section 6 of the Act of June 8, 1872 (Rev. Stat. 396), the Postmaster General was empowered to "superintend the business of the department and execute laws relative to the postal service." As a matter of administration the Postmaster General, through his subordinates, rejects matter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. The existence in the Postmaster General of the power to do this cannot be doubted. The only question which can arise is whether in the individual case the power has been illegally exercised.[5] But while he may thus exclude from the mail specific matter which he deems of the kind declared by Congress to be unmailable, he may not, either as a preventive measure or as a punishment, order that in the future mail tendered by a particular person or the future issues of a particular paper shall be refused transmission.

Until recently, at least, this appears never to have been questioned and the Post Office Department has been authoritatively advised that the power of excluding matter from the mail was limited to such specific matter as upon examination was found to be unmailable and that the Postmaster General could not make an exclusion order operative upon future issues of a newspaper.

In 1890 Tolstoi's Kreutzer Sonata had been excluded from the mails as indecent. Certain newspapers began to publish the book in instalments and their position was referred to the Attorney General. He replied:

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[4]Criminal Code, Sections 211, 212, 213, 217; Act of March 3, 1917, c. 162, sec. 5, 39 Stat. 1069; Espionage Act of June 15, 1917, c. 30, Title XII, 40 Stat. 230.

[5]Orders excluding individual issues of newspapers or periodicals because of unmailable matter contained therein were sustained in Masses Publishing Co. *v.* Patten, 246 Fed. 24; Anderson *v.* Patten, 247 Fed. 382. In Post Publishing Co. *v.* Murray, 230 Fed. 773, and Brooklyn Daily Eagle *v.* Voorhies, 181 Fed. 579, such orders were enjoined as being unwarranted by the facts. See also Davis *v.* Brown, 103 Fed. 909.

" . . . I do not see that it necessarily follows that every instalment of the story thus published is obscene, because the story as a whole is declared to be so. It may be indeed that one or more chapters of this story are entirely unexceptionable in character. If so, the exclusion, as unmailable, of newspapers containing them might involve serious consequences to yourself." (19 Op. Att. Gen. 667, 668.)

Again, in 1908, President Roosevelt asked the Attorney General if the law permitted him to deny the mails to an anarchist newspaper published in the Italian language in which appeared articles advocating the murder of the police force of Patterson and the burning of the city. The Attorney General advised him that such an article constituted a seditious libel (it has since been made criminal by statute, Act of March 4, 1911, c. 241, sec. 2), and that "the Postmaster General (would) be justified in excluding from the mails any issue of any periodical, otherwise entitled to the privileges of second class mail matter, which shall contain any article containing a seditious libel and counseling such crimes as murder, arson, riot, and treason." (26 Op. Att. Gen. 555.)

But the Attorney General was careful to point out that the law gave no authority to exclude issues of the paper which should contain no objectionable matter:

"It must be premised that the Postmaster General clearly has no power to close the mails to any class of persons, however reprehensible may be their practices or however detestible their reputation; if the question were whether the mails could be closed to all issues of a newspaper, otherwise entitled to admission, by reason of an article of this kind in any particular issue, there could be no doubt that the question must be answered in the negative" p. 565.

If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them, tantamount to a denial of the right of circulation. Congress has not granted to the Postmaster General power to deny the right of sending matter by mail even to one who has been convicted by a jury and sentenced by a court for unlawful use of the mail and who has been found by the Postmaster General to have been habitually using the mail for frauds or lotteries and is likely to do so in the future. It has, in order to protect the public, directed postmasters to return to

the sender mail addressed to one found by the Postmaster General to be engaged in a scheme to defraud or in a lottery enterprise.[6] But beyond this Congress has never deemed it wise, if, indeed, it has considered it constitutional, to interfere with the civil right of using the mail for lawful purposes.[7]

The Postmaster General does not claim here the power to issue an order directly denying a newspaper all mail service for the future.[8] Indeed, he asserts that the mail is still open to the

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[6]Revised Statutes, Sec. 3929, as amended by Act September 19, 1890, c. 908, sec. 2, 26 Stat. 465, as amended by Act March 2, 1895, c. 191, sec. 4, 28 Stat. 964.

By Section 2 of the Act of May 16, 1918, c. 75, 40 Stat. 554—enacted after this case had gone to judgment in the trial court—authority was conferred upon the Postmaster General to stop, in like manner, delivery of mail to a person whom he finds "upon evidence satisfactory to him" to be using the mails in violation of the Espionage Act.

[7]In the Sixty-third Congress, Third Session (1915) a bill, H. R. 20644, was introduced to deny absolutely the use of the mail to any person who, in the opinion of the Postmaster General, "is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libellous character". It was objected: The "bill would invest one man . . . with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular court practice. The punishment which may be inflicted upon a publisher by the Postmaster General under the provisions of this bill is most severe, absolutely depriving him of the privilege of using the United States mails, even for legitimate purposes. . . . Furthermore, this bill makes it possible for the Postmaster General to inflict what is practically a confiscatory penalty for an offence not clearly defined. . . . Under such circumstances as these it is not safe to leave to the decision of one man, after an *ex parte* investigation, a decision which will involve the freedom of the press. Trial by jury and a penalty inflicted for each specified act is the only safeguard against an arbitrary and tyrannical power." The bill failed of passage. Hearings before Committee on Post Office and Post Roads, February 1, 1915, On Exclusion of Certain Publications from the Mails, pp. 38, 39, 63rd Cong. 3d Sess. See The Postal Power of Congress by Lindsay Rogers, Johns Hopkins University Studies (1916, Series XXXIV, No. 2) pp. 158, 159.

[8]In a letter to Senator Bankhead the Postmaster General said:

"I will state generally with regard to the action of the Department that no newspaper or periodical has been denied the privilege of the mails as such. Particular issues of certain publications have been found to contain matter that would interfere with the operation and success of the military and naval

Milwaukee Leader upon payment of first, third or fourth-class rates. He contends however that in regard to second-class rates special provisions of law apply under which he may deny that particular rate at his discretion. This contention will now be considered.

Second. The second-class mail rate is confined to newspapers and other periodicals, which possess the qualifications and comply with the conditions prescribed by Congress.[9] In the present case the Postmaster General insists that by reason of alleged past violations of Title XII of the Espionage Act, two of the conditions had ceased to be fulfilled. His reasons are these: The Mail Classification Act of March 3, 1879, c. 180, 20 Stat. 358, provides by Section 14, that a newspaper to be mailable at the second-class rates "must be regularly issued at stated intervals as frequently as four times a year", and that it must be "originated and published for the dissemination of information of a public character." If

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forces . etc., etc. . . . and therefore unmailable under the act in question." Cong. Rec. Aug. 22, 1917, pp. 6851-6857. See also a letter to Mr. Moon, Chairman of the House Committee on Post Offices and Post Roads, House Report No. 109, 65th Congress, 1st Session.

[9]Act of March 3, 1879, c. 180, sec. 14, 20 Stat. 359: "That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; *Provided, however,* That nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

Act of August 24, 1912, c. 389, sec. 1, 37 Stat. 550, applying to publications of benevolent, professional, etc. societies, educational institutions, State boards, trade unions, etc.

Act of August 24, 1912, c. 389, sec. 2, 37 Stat. 553, requiring a sworn statement of the names of editors, owners, stockholders, bondholders, etc., and that all paid matter be plainly marked "advertisement." Lewis Pub. Co. *v.* Morgan, 229 U. S. 288.

any issue of a paper has contained matter violative of the Espionage Act, the paper is no longer "regularly issued"; and likewise it has ceased to be a paper "published for the dissemination of information of a public character."[10] The argument is obviously unsound. The requirement that the newspaper be "regularly issued" refers, not to the propriety of the reading matter, but to the fact that publication periodically at stated intervals must be intended and that the intention must be carried out. Similarly, the requirement that the paper be "published for the dissemination of information of a public character" refers not to the reliability of the information or the soundness of the opinions expressed therein, but to the general character of the publication. The Classification Act does not purport to deal with the effect of, or the punishment for, crimes committed through a publication. It simply provides rates and classifies the material which may be sent at the respective rates. The Act says what shall constitute a newspaper. Undoubtedly the Postmaster General has latitude of judgment in deciding whether a publication meets the definition of a newspaper laid down by the law, but the courts have jurisdiction to decide whether the reasons which an administrative officer gives for his actions agree with the requirements of the statute under which he purports to act. *Gegiow* v. *Uhl*, 239 U. S. 3; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. The fact that material appearing in a newspaper is unmailable

[10]In a letter to Senator Bankhead August 22, 1917, Cong. Rec. pp. 6851-6857, submitted at the argument, the Postmaster said:

"For many (?) years this Department has held publications not to be 'regularly issued' in contemplation of law when any issue contained nonmailable matter; and when the second-class privilege has been withdrawn under such circumstances, the formal notice of withdrawal has contained the statement that the second-class privilege has been revoked on both the grounds stated."

In his report for the year ending June 30, 1918, the Postmaster General says, p. 46:

"In the administration of the law governing second-class matter it was again found necessary to revoke the second-class mail privilege of some publications for the reason that their contents consisted more or less of matter which was non-mailable under the Espionage and other laws, and which, therefore, removed them from the class of publications entitled to that privilege."

The statement is repeated in the Postmaster General's report for the year ending June 30, 1919, p. 25.

under wholly different provisions of law can have no effect on whether or not the publication is a newspaper. Although it violates the law, it remains a newspaper. If it is a bad newspaper the act which makes it illegal and not the Classification Act provides the punishment.

There is, also, presented in brief and argument, a much broader claim in support of the action of the Postmaster General. It is insisted that a citizen uses the mail at second-class rates not as of right—but by virtue of a privilege or permission, the granting of which rests in the discretion of the Postmaster General. Because the payment made for this governmental service is less than it costs, it is assumed that a properly qualified person has not the right to the service so long as it is offered; and may not complain if it is denied to him. The service is called the second-class privilege. The certificate evidencing such freedom is spoken of as a permit. But, in fact, the right to the lawful postal rates is a right independent of the discretion of the Postmaster General. The right and conditions of its existence are defined and rest wholly upon mandatory legislation of Congress. It is the duty of the Postmaster General to determine whether the conditions prescribed for any rate exist. This determination in the case of the second-class rate may involve more subjects of enquiry, some of them, perhaps, of greater difficulty, than in cases of other rates. But the function of the Postmaster General is the same in all cases. In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office.[11] And it is not a function which either involves or permits the exercise of discretionary power. The so-called permit

[11]The orders of the Postmaster General excluding periodicals from second-class mail, sustained in Houghton *v.* Payne, 194 U. S. 88; Bates & Guild Co. *v.* Payne, 194 U. S. 106, and Smith *v.* Hitchcock, 226 U. S. 53; as well as the fraud orders sustained in Public Clearing House *v.* Coyne, 194 U. S. 497, and that with which the Court refused to interfere by certiorari in Degge *v.* Hitchcock, 229 U. S. 162, involved merely decisions of this nature. In School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94, his fraud order was set aside because wholly unwarranted by the facts.

is mere formal notice of his judgment, but indispensible to the publisher because without it the local postmaster will not transmit the publication at second-class rates. The same sort of permit is necessary for the same bulk service at first, third or fourth-class rates.[12] There is nothing, in short, about the second-class rate which furnishes the slightest basis in law for differentiating it from the other rates so far as the discretion of the Postmaster General to grant or withhold it is concerned.

Third. Such is the legislation of Congress. It clearly appears that there was no express grant of power to the Postmaster General to deny second-class mail rates to future issues of a newspaper because in his opinion it had systematically violated the Espionage Act in the past; and it seems equally clear that there is no basis for the contention that such power is to be implied. In respect to newspapers mailed by a publisher at second-class rates there is clearly no occasion to imply this drastic power.[13] For a publisher must deposit with the local postmaster, before the first mailing of every issue, a copy of the publication which is now examined for matter subject to a higher rate and in order to determine the portion devoted to advertising. Act of March 3, 1879, c. 180, sec. 12, 20 Stat. 359; Act of October 3, 1917, c. 63, sec. 1101, 40 Stat. 327. If there is illegal material in the newspaper, here is ample opportunity to discover it and remove the paper from the mail. Indeed, of the four classes of mail, it is the second alone which affords to the postal official full opportunity of ascertaining, before deposit

[12]Under recent legislation a "permit" may be issued for either first, third or fourth-class mail. Under Act of April 28, 1904, c. 1759, sec. 2, as amended by Act of May 18, 1916, c. 126, sec. 13 and Act of April 24, 1920, identical articles may be deposited in large quantities without stamps affixed and sent at first, third or fourth-class rates, according to their nature, by paying the postage in advance in cash in a lump sum.

[13]In the one case where drastic preventive measures were considered necessary—in the case of the foreign language press—Congress granted discretionary power to the Postmaster General specifically and in plain terms. By Act of October 6, 1917, c. 106, sec. 19, 40 Stat. 425 (The Trading With The Enemy Act), it was provided that, until the end of the war, foreign language papers should be nonmailable unless a translation should have been previously filed with the local postmaster, but that the Postmaster General might at his discretion grant a permit to mail without such translation. This Act applied to publications sent by any class of the mails.

in the mail, whether that which it is proposed to transmit is mailable matter. But even if the statutes were less clear in this respect than they seem to me, I should be led to adopt that construction because of the familiar rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware and Hudson Co.*, 213 U. S. 366, 408. For adoption of the construction urged by the Postmaster General would raise not only a grave question, but a "succession of constitutional doubts" as suggested in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 422. It would in practice seriously abridge the freedom of the press. Would it not also violate the First Amendment? It would in practice deprive many publishers of their property without due process of law. Would it not also violate the Fifth Amendment? It would in practice subject publishers to punishment without a hearing by any court. Would it not also violate Article Third of the Constitution? It would in practice subject publishers to severe punishment for an infamous crime without trial by jury. Would it not also violate the Sixth Amendment? And the punishment inflicted—denial of a civil right—is certainly unusual. Would it also violate the Eighth Amendment? If the construction urged by the Postmaster General is rejected, these questions need not be answered; but it seems appropriate to indicate why the doubts raised by them are grave.

(a) The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats or libels. It may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails. *In re Rapier*, 143 U. S. 110. *Lewis Pub. Co.* v. *Morgan*, 229 U. S. 288. As stated in *Ex parte Jackson*, 96 U. S. 727, 732: "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the

mail." In other words, the postal power, like all its other powers, is subject to the limitations of the Bill of Rights. *Burton* v. *United States*, 202 U. S. 344, 371. Compare *Adair* v. *United States*, 208 U. S. 161. Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This court also stated in *Ex parte Jackson*, that "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." *Cummings* v. *State of Missouri*, 4 Wall. 277, 325. The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression.[14]

How dangerous to liberty of the press would be the holding that the second-class mail service is merely a privilege, which Con-

[14]See "Freedom of Speech" by Zechariah Chafee, Jr., pp. 105-109, 233-234; also p. 199: "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." It has been uniformly held that a statute prescribing similar penalties for failure to observe its provisions or the order of a public service commission, although made after full hearing, are a deterrent so potent as to amount to a denial of the right to a judicial review, and operate as a taking of property without due process of law in violation of the Fourteenth Amendment. Ex parte Young, 209 U. S. 123, 147; Missouri Pacific Ry. Co. *v.* Tucker, 230 U. S. 340, 349; Wadley Southern Ry. Co. *v.* Georgia, 235 U. S. 651, 662; Oklahoma Operating Co. *v.* Love, 252 U. S. 331, 337.

gress may deny to those whose views it deems to be against public policy is shown by the following contention made in 1912 by the Solicitor General in the *Lewis* case (see Brief, pp. 46-47):

"A possible abuse of power is no argument against its existence, but we may as well observe that a denial of the mails to a paper because of its ownership or the views held by its owners may well be illegal as having no relation to the thing carried in the mails *unless the views are expressed in the paper;* but *if such views are expressed in the paper* Congress can doubtless exclude them, just as Congress could now exclude all papers advocating lotteries, prohibition, anarchy, or a protective tariff if a majority of Congress thought such views against public policy." (Italics in the original.)[11]

(b) The right which Congress has given to all properly circumstanced persons to distribute newspapers and periodicals through the mails is a substantial right. *Hoover* v. *McChesney*, 81 Fed. 472; *Payne* v. *Nat. Ry. Pub. Co.*, 20 App. D. C. 581; 192 U. S. 602. It is of the same nature as, indeed, it is a part of, the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations. *Adair* v. *United States*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1; *Adams* v. *Tanner*, 244 U. S. 590; *Allgeyer* v. *Louisiana*, 165 U. S. 578. A law by which certain publishers were unreasonably or arbitrarily denied the low rates would deprive them of liberty or property without due process of law; and it would likewise deny them equal protection of the laws. Compare *Second Employers' Liability* cases, 223 U. S. 1, 52-53. The court might hold that a statute which conferred upon the Postmaster General the power to do this, because of supposed past infractions of law, was unreasonable and arbitrary; particularly in respect to second-class mail which affords ample opportunity for preventing the transmission of unmailable matter; and hence obnoxious to the Fifth Amendment.

The contention that, because the rates are non-compensatory, use of the second-class mail is not a right but a privilege which may be

[11] It was, perhaps, in reference to this contention that the court said in closing its opinion in that case (p. 316): "We do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of conditions embodied in the proposition of the Government which we have previously stated."

granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation.[16]

(c) The order revoking the entry of The Milwaukee Leader to second-class mail was clearly a punitive, not a preventive measure; as all classes of mail except the second were, as the Postmaster General states, left open to it provided it had sufficient financial resources. Of the three left available the third class being for "miscellaneous printed matter", was an appropriate one for distributing newspapers and was the cheapest. But the additional cost to the publisher involved in distributing daily 9,000 copies, by the third-class mail would be a very serious one. The actual and intended effect of the order was merely to impose a very heavy fine, possibly $150 a day, for supposed transgression in the past. But the trial and punishment of crimes is a function which the Constitution, Article III, Sec. 2, cl. 3, entrusts to the judiciary.[17] I am not aware that any other civil administrative officer has assumed, in any country in which the common law prevails, the power to inflict upon a citizen severe punishment for an infamous crime. Possibly the court would hold that Congress could not, in view of Article III of the Constitution, confer upon

[16]This is true, although the deficit is covered directly, in large part, by profits on first-class mail. The net cost of this service to the Government was, before the World War, equal to one-tenth of its expenditures for all other than postal purposes. Compare Lewis Publishing Co. v. Morgan, 229 U. S. 288, 304, with 34 Statistical Abstract of the United States (1911), p. 656. The justification for this non-compensatory service lies in the belief that education in its broad sense—intellectual activity fostered through the dissemination of information and of ideas—is essential to the life of a free, self-governing and striving people. This non-compensatory service is comparable to many rendered by the Government, *e. g.*, to the facilitation of communication and commerce by port, canal, passport or consular services, for all of which only small charges, or none, are made.

That a Government furnishing public service must be judged by ordinary standards of public callings. See Cafee on Freedom of Speech, p. 109, citing H. J. Laski in 31 Harvard Law Review 186, and Laski's Authority in the Modern State, p. 378.

[17]Compare Harbor Commissioners v. Redwood Co., 88 Cal. 491; Cleveland, etc. Ry. Co. v. People, 212 Ill. 638; Langenberg v. Decker, 131 Ind. 471; In re Sims, 54 Kan. 1.

the Postmaster General as a mere incident in the administration of his department, authority to issue an order which could operate only as a punishment. *See Wong Wing* v. *United States*, 163 U. S. 228, 235-237.

(d) The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed and that he shall be confronted with the witnesses against him. It is only in the case of petty offences that the jury may be dispensed with. *Schick* v. *United States*, 195 U. S. 65, 68. What is in effect a very heavy fine has been imposed by the Postmaster General. It has been imposed because he finds that the publisher has committed the crime of violating the Espionage Act. And that finding is based in part upon "representations and complaints from sundry good and loyal citizens" with whom the publisher was not confronted. It may be that the court would hold, in view of Article Sixth in our Bill of Rights, that Congress is without power to confer upon the Postmaster General, or even upon a court, except upon the verdict of a jury and upon confronting the accused with the witnesses against him, authority to inflict indirectly such a substantial punishment as this. *See Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343.

(e) The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history. Every fine imposed by a court is definite in amount.[18] Every fine prescribed by Congress is limited in amount. Statutes frequently declare that each day's continuation of an offence shall constitute a new crime. But here a fine imposed for a past offence is made to grow indefinitely each day—perhaps throughout the life of the publication. Already, having grown at the rate of say $150 a day, it may aggregate, if the circulation has been maintained, about $180,000 for the three years and four months since the order was entered; and its growth continues. It was assumed in *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 111, that an excessive fine, even if definite, would violate the Eighth Amend-

[18] Compare Morris v. State, 1 Blackf. (Ind.) 37, 38; State v. Bennett, 4 Dev. & B. (N. C.) 43, 50; Easterling v. State, 35 Miss. 210.

ment. Possibly the court, applying the Eighth Amendment, might again, as in *Weems* v. *United States*, 217 U. S. 349, 381, make clear the "difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

The suggestion is made that if a new application for entry to second-class mail had been made the publishers might have been granted a certificate. It is no bar to proceedings to set aside an illegal sentence, that an application to the Executive for clemency might have resulted in a pardon.

In conclusion I say again—because it cannot be stressed too strongly—that the power here claimed is not a war power. There is no question of its necessity to protect the country from insidious domestic foes. To that end Congress conferred upon the Postmaster General the enormous power contained in the Espionage Act of entirely excluding from the mails any letter, picture or publication which contained matter violating the broad terms of that Act. But it did not confer—and the Postmaster General concedes that it did not confer—the vague and absolute authority practically to deny circulation to any publication which in his opinion is likely to violate in the future any postal law. The grant of that power is construed into a postal rate statute passed forty years ago which has never before been suspected of containing such implications. I cannot believe that in establishing postal classifications in 1879 Congress intended to confer upon the Postmaster General authority to issue the order here complained of. If, under the Constitution, administrative officers may, as a mere incident of the peace time administration of their departments, be vested with the power to issue such orders as this, there is little of substance in our Bill of Rights and in every extension of governmental functions lurks a new danger to civil liberty.